CLERK'S COP

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 453

THE EAST OHIO GAS COMPANY, APPELLANT,

vs.

THE TAX COMMISSION OF OHIO ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

FILED SEPTEMBER 13, 1930

(35,375)

(35,375)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 453

THE EAST OHIO GAS COMPANY, APPELLANT,

vs.

THE TAX COMMISSION OF OHIO ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

INDEX

	Original	Print
Record from district court of United States, Southern Ohio	2	1
Bill of complaint	2	1
Exhibit "A"—Letter from East Ohio Gas Co. to Tax Commission of Ohio, July 29, 1927	16	11
Exhibits "B-1-a" to "B-3-b"—Bills from treasurer and checks in payment of same	19	13
Exhibit "C"—Notice and demand	22	16
Exhibit "D"—Order of Commission denying application for review	23	17
Motion for restraining order....(omitted in printing)	24	
Notice of application for temporary injunction	25	18
Order to show cause	27	19
Answer	28	20
Narrative form of testimony	35	26
Exhibit "A"—Agreed statement of facts	36	26
Appendix A. Gas purchase agreements:		
Hope Natural Gas Company and The East Ohio Gas Company, original agreement, March 1, 1910	66	39
Supplemental agreement, April 12, 1921	72	43

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 6, 1931

	Original	Print
Supplemental agreement, April 30, 1924	74	54
Supplemental agreement, September 1, 1928	79	57
Appendix B.		
Map	81	58
Opinion per curiam	82	59
Decree	87	63
Petition for appeal, assignments of error, and prayer for reversal	88	64
Order allowing appeal	90	65
Bond on appeal (omitted in printing)	91	
Citation and service (omitted in printing)	93	
Docket entries	95	66
Stipulation re transcript of record	96	66
Clerk's certificate (omitted in printing)	98	
Statement of points to be relied upon and stipulation as to parts of record to be printed	99	67

[fols. a-2]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

In Equity. No. 792

THE EAST OHIO GAS COMPANY, a Corporation, Complainant,

vs.

THE TAX COMMISSION OF OHIO, QUINCY A. DAVIS, JOHN S. Edwards, and George C. Braden, as Members of the Tax Commission of Ohio; Joseph T. Tracy, Auditor of the State of Ohio; H. Ross Ake, Treasurer of the State of Ohio; Clarence J. Brown, Secretary of the State of Ohio; Gilbert Bettman, Attorney General of Ohio, Defendants

BILL OF COMPLAINT

To the Honorable Judge of the United States District Court for the Southern District of Ohio, Eastern Division:

The East Ohio Gas Company, complainant herein, files this its Bill of Complaint and for its cause of action against the defendants hereinafter named, avers:

1. The East Ohio Gas Company is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio with its principal office and place of busi-[fol. 3] ness at Cleveland, Ohio. The defendants, Joseph T. Tracy, H. Ross Ake, Clarence J. Brown and Gilbert Bettman are respectively the duly elected, qualified and acting Auditor of the State of Ohio, Treasurer of the State of Ohio, Secretary of the State of Ohio and Attorney General of the State of Ohio. The defendants Quincy A. Davis, John S. Edwards and George C. Braden are the duly appointed, qualified and acting members of the defendant, The Tax Commission of Ohio. The defendants are vested by the statutes of the State of Ohio with authority to fix and determine excise taxes upon the gross receipts of public utility corporations doing business in the State of Ohio and to enforce the collection of excise taxes and the penalties provided by statute for the failure to pay

the same. For convenience the respective defendants are referred to hereinafter by their official designations.

2. The ground of Federal jurisdiction asserted is that the excise taxes which the defendants have levied and threatened to collect from the complainant upon its gross receipts for the years 1927, 1928 and 1929, as hereinafter alleged, are upon gross receipts arising from interstate commerce and are a burden upon interstate commerce, contrary to the provisions of Article I, Section 8, of the Constitution of the United States. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.

3. The complainant is a natural gas company and a public utility as defined by the statutes of Ohio hereinafter referred to, engaged in the production, transportation and distribution of natural gas to more than 400,000 consumers in more than fifty municipalities in the northern and eastern parts of the State of Ohio and was so engaged at all [fol. 4] times herein material. The principal cities the complainant serves are Cleveland, Akron, Canton, Massillon and Youngstown. In connection with its business the complainant owns an doperates four trunk pipe lines extending from the Ohio River in Monroe and Belmont Counties northwesterly to the complainant's distribution systems in various municipalities. The complainant owns many parcels of real estate as well as large inventories of personal property distributed through nineteen counties of the State of Ohio, including the counties of Monroe, Belmont and Harrison within the Eastern Division of the Southern District of Ohio. In particular the complainant owns in fee the following parcel of real estate located in said judicial district:

"Situated in Section 31, Township 8 and Range 4 in Wheeling Township, Belmont County, State of Ohio, beginning at an iron pin in section line in the Morristown and Uniontown Road at top of hill where the road leaves section line and thence on said section line north 3½ degrees east 41.90 rods to an iron pin: thence south 86 degrees east 19.20 rods to an iron pin near east gas valve pit: thence south 86½ degrees east, 3.08 rods to an iron pin in aforesaid road: thence south 22½ degrees west 10.10 rods to an

iron pin in said road: thence south 30¼ degrees west 36.23 rods to an iron pin in said road and place of beginning."

4. During the years 1927, 1928 and 1929 approximately three-fourths of the supply of natural gas marketed by the complainant to its consumers in the State of Ohio was purchased by it either from The Hope Natural Gas Company, a corporation organized under the laws of West Virginia with producing fields located in that state, or from the Peoples Natural Gas Company, a corporation organized under the laws of Pennsylvania with producing fields lo- [fol. 5] cated in that state, delivery being made to the complainant in each case at the Ohio State line at which point the transmission lines of the complainant connect with the transmission lines of The Hope Natural Gas Company and of The Peoples Natural Gas Company. All natural gas purchased by the complainant from said companies moves directly from the producing wells in West Virginia and Pennsylvania across the Ohio state line, through the complainant's transmission lines and distribution systems in Ohio directly to consumers' appliances without interruption from the time it leaves the producing wells outside of Ohio until it is burned in consumers' appliances in Ohio. Pumping stations are maintained by the producing companies in their respective states and the gas is delivered into complainant's lines at sufficient pressure to deliver it at consumers' appliances. The remaining one-fourth of the complainant's supply of natural gas for said years came from producing fields in the State of Ohio.

5. The statutes of Ohio in force during said three years provide in substance:

General Code Section 5470, that each public utility shall annually, on or before August first, under oath of an appropriate officer, file a statement with the Tax Commission of Ohio in such form as the Commission may prescribe;

General Code Section 5474, that such statement shall contain "the entire gross receipts of the company, including all sums earned or charged, whether actually received or not, from whatever source derived, for business done within this state for the year next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connec-

tion with other companies, firms, corporations, persons [fol. 6] or associations, but this shall not apply to receipts from interstate business, or business done for the Federal Government. Such statement shall also contain the total gross receipts of such company for such period in this state from business done within the state";

General Code Section 5475, that on the first Monday of September said Tax Commission shall ascertain and determine the entire gross receipts of each natural gas company for business done within the state for the year next preceding the first day of May, excluding therefrom "all receipts derived wholly from interstate business or business done for the Federal Government";

General Code Section 5476, that the amount so ascertained shall be the gross receipts of such natural gas company for business done within this state for such year;

General Code Section 5481, that on the first Monday of October the Commission shall certify to the Auditor of State the amount of gross receipts so determined;

General Code Section 5483, that in the month of October, annually, the Auditor of State shall charge for collection from each natural gas company a sum in the nature of an excise tax, "for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the Commission as the gross receipts of such company on its intra-state business for the year covered by its annual report to the Commission, as required in this act, by taking one and thirty-five one-hundredths per cent of all such gross receipts";

General Code Section 5488, that after determining the amount of such taxes the Auditor of State shall prepare proper duplicates and reports and certify them to the Treasurer of State for collection, and upon receipt of such [fol. 7] duplicate the Treasurer shall notify each company charged with taxes of the amount due from it;

General Code Section 5489, that the Treasurer of State shall proceed to collect such taxes and report to the Auditor of State the amount and the name of the company from whom collected.

6. On or before August first in each of the years 1927, 1928 and 1929 complainant duly reported to the Tax Com-

mission of Ohio, as required by the statutes aforesaid, on forms approved by said Commission, the amount of its gross receipts for the year ending April 30th preceding as follows:

	1927	1928	1929
Entire receipts from intra-state business (exclusive of business done for the Federal Government)	6,831,811	8,592,528	9,525,176
Intra-state business done for Federal Government	404	466	519
Entire receipts from interstate business (exclusive of business done for the Federal Government)	20,799,907	20,374,214	20,646,916
Interstate business done for Federal Government	1,398	1,841	1,262
Total	27,633,520	28,968,549	30,170,873

The receipts so reported as receipts from interstate business are in their entirety receipts from the sale of gas purchased from The Hope Natural Gas Company or The Peoples Natural Gas Company and sold by the complainant in Ohio, as hereinbefore alleged. The receipts so reported as receipts from intra-state business are in their entirety receipts from the sale of gas produced or purchased and sold by the complainant in Ohio. The receipts reported as business done for the federal government are the receipts from the sale of gas to United States Post Offices and hospitals. The complainant accompanied the report of 1927 to the Tax Commission of Ohio with a letter advising it of the [fol. 8] separation it had made in its report between receipts from interstate and intra-state business and the facts upon which such separation was made. A true copy of said letter is marked "Exhibit A", attached hereto and made a part hereof.

7. Thereafter in each of the years 1927, 1928 and 1929 the Tax Commission of Ohio, acting pursuant to the statutes hereinbefore set forth, fixed the intra-state gross receipts of the complainant and certified the same to the Auditor of State in the following amounts:

	Intrastate Gross Receipts
1927	$6,831,811
1928	8,592,528
1929	9,525,176

Thereafter in each year the Auditor of State computed the tax on the gross receipts so certified to him at the rate of one and thirty-five one-hundredths per cent and certified the tax so computed to the Treasurer of State who rendered statements therefor to this complainant. Thereafter in each year and prior to December fifteenth, the last day provided by law for the payment of the same, the complainant paid said excise taxes to the Treasurer of the State of Ohio. The amount of taxes so computed, certified, billed and paid was:

1927	$92,229.45
1928	115,999.13
1929	128,589.88

True copies of said bills from the Treasurer of the State of Ohio, and of the checks in payment of the same are marked Exhibits "B-1a", "B-1b", "B-2a", "B-2b", "B-3a", and "B-3b", attached hereto and made a part hereof. In addition to these excise taxes the Complainant paid real and personal property taxes in Ohio as follows:

[fol. 9] 1927	$1,008,610
1928	1,044,917
1929	1,108,628

8. On January 13, 1930, the Tax Commission of Ohio made the following order:

"In the Matter of Omitted Amounts of Certain Public Utilities

"The Commission this day proceeding to review the amounts heretofore found by it to have been omitted by certain public utilities as named in Duplicate No. 401, and said companies having been notified of the amounts so fixed as aforesaid and offered opportunity to be heard in the matter of such omitted amounts of gross receipts, and having carefully and fully considered all facts submitted and all other facts and information coming to its knowledge, orders that the amounts of such omitted gross receipts be and the same are finally fixed and determined to be the amounts as set out in the accompanying schedule; and fur-

ther orders that the schedule be certified to the Attorney General with the request that he institute such action as may be proper or necessary in the Court of Common Pleas of Franklin County or of any county in which such companies are doing business or own property for the collection of such fees and penalties."

In the schedule accompanying said order the Tax Commission of Ohio found and certified what it designated as "omitted gross receipts" of the complainant as follows:

1927	$20,799,907
1928	20,376,021
1929	20,643,916

9. Said order of January 13, 1930, was certified to the Auditor of State by the Tax Commission of Ohio and on or [fol. 10], about the same date said auditor computed the excise taxes thereon at the rate of one and thirty-five one-hundredths per cent, together with penalties of fifteen per cent, and delivered the same to the Attorney General of Ohio for collection. The amount of taxes and penalties so certified for collection are as follows:

1927 excise tax	$280,798.74	
Penalty	42,119.81	
		$322,918.55
1928 excise tax	275,076.28	
Penalty	41,261.44	
		316,337.72
1929 excise tax	278,682.87	
Penalty	41,803.93	
		320,496.80
		$959,753.07

10. On or about January 16, 1930, the Attorney General of Ohio notified the complainant that the amounts above set forth had been certified to him for collection and demanded immediate payment thereof. A true copy of such notice and demand is marked "Exhibit C", hereto attached and made a part hereof.

11. On March 13, 1930, and within sixty days from the date of said order of January 13, 1930, the complainant

duly filed with the Tax Commission of Ohio an application for a review and re-hearing of said order as permitted by General Code Section 5517 and thereafter the same was denied by the Tax Commission of Ohio. A true copy of the order denying said application is marked "Exhibit D" hereto attached and made a part hereof.

12. The gross receipts of the complainant certified by the Tax Commission of Ohio as omitted for the years 1927, 1928 and 1929, by said order of January 13, 1930, are gross receipts from sales to the United States Government to the [fol. 11] extent of $404 in 1927, $466 in 1928, and $519 in 1929 and the balance thereof are gross receipts from the sale in Ohio of natural gas purchased by the plaintiff from the supplying companies in West Virginia and Pennsylvania, as hereinbefore alleged, in paragraph 6, and are receipts from interstate commerce. The action of said Tax Commission of Ohio in including said gross receipts in said order and the action of the Auditor of the State of Ohio in fixing an excise tax thereon are illegal and void for the reasons—first, that the statutes of Ohio, as hereinbefore set forth, do not impose an excise tax upon said gross receipts which are the recepits from interstate commerce and from business done for the Federal government, and second, the effect of said order of the Tax Commission of Ohio and of said action of the Auditor of the State of Ohio is the imposition of a tax and burden upon interstate commerce contrary to the commerce clause of the Federal Constitution, to-wit Article I, Section 8, thereof.

13. By the provisions of the statutes of Ohio, General Code, Section 5506, it is provided that annually on the day fixed for the payment of any excise tax required to be paid by law "such tax, together with any penalties subsequently accruing thereon, shall become a lien on all property in this state of a public utility or corporation" and that "such lien shall continue until such taxes, together with any penalties subsequently accruing thereon, are paid." Said illegal and invalid taxes as so assessed, together with penalties thereon, is now a lien on the real and personal property of this plaintiff in the State of Ohio and constitutes a cloud upon the title of the complainant to said property for the removal of which the complainant has no adequate remedy save in a court of equity.

[fol. 12] 14. By the provisions of the statutes of Ohio it is provided:

General Code Section 5509, that if any public utility fails to pay any tax or fee for a period of ninety days after the time prescribed for paying the same, the Commission shall certify such fact to the Secretary of State and "the Secretary of State shall thereupon cancel the Articles of Incorporation of any such corporation which is organized under the laws of this state by appropriate entry upon the margin of the record thereof" and "thereupon all the powers, privileges and franchises conferred upon such corporations, by such Articles of Incorporation or by such certificate of authority, shall cease and determine";

General Code Section 5510, that any person or persons who shall exercise or attempt to exercise any powers, privileges or franchises, under the Articles of Incorporation after the same are canceled shall be fined not less than $100 nor more than $1,000;

General Code Section 5512, that in addition to all other remedies for the collection of taxes the Attorney General shall, upon the request of the Tax Commission, whenever any taxes, fees or penalties are due from any public utility or corporation and shall have remained unpaid for a period of ninety days, apply to the Common Pleas Court of Franklin County, or of any county in the state in which such public utility or corporation is located, or has an office, or place of business, for an injunction to restrain such public utility or corporation from the transaction of any business within this state, until the payment of such taxes, fees or penalties thereon; and if it is made to appear to the Court, upon [fol. 13] hearing, that such public utility has failed and neglected for ninety days to pay such taxes, fees or penalties thereon, such Court of Common Pleas shall grant and issue such injunction.

15. The defendants and each of them in their respective capacities hereinbefore stated threaten to, and will unless restrained by order of this Court, attempt to enforce and collect said additional and invalid excise taxes fixed for the years 1927, 1928 and 1929 and threaten to, and will unless so restrained, exercise all the powers and enforce against the complainant all the penalties provided by the statutes hereinbefore set forth with the result that the complainant but for the interposition of this Court is threat-

ened with the revocation and cancellation of its authority to do business in the State of Ohio, with a suit to enjoin its transaction of further business in the State of Ohio, all of which will inevitably and irreparably injure its business in this state, now approximating $30,000,000 per annum, and will inevitably and irreparably injure the public that it serves. From this situation the complainant has no relief save in a court of equity.

Wherefore the complainant prays:

a. That writs of subpoena be issued to each of the defendants hereinbefore named commanding each of them to appear herein and answer this complaint but not under oath, answer under oath being expressly waived.

b. That said order of the Tax Commission of Ohio dated January 13, 1930, purporting to determine omitted gross receipts for the years 1927, 1928 and 1929, as hereinbefore alleged, and the taxes thereon computed by Joseph T. Tracy, Auditor of State, be each of them declared to be [fol. 14] void and of no effect, and the title to the complainant's property be quieted as to the lien of said taxes.

c. That writs of injunction both temporary and permanent issue to the defendants and each of them enjoining and restraining them, their employes and agents from attempting in any manner to collect said additional excise taxes assessed for the years 1927, 1928 and 1929, from attempting to collect or enforce any of the penalties assessed on account thereof, and from attempting in any manner to cancel the charter of this complainant or its authority to do business in Ohio, or from enforcing any penalty or pursuing any remedy provided by the statutes of Ohio on account of the complainant's failure to pay said taxes and penalties thereon for the years 1927, 1928 and 1929.

d. That the Court grant such other and further relief as the complainant may be entitled to receive in equity.

William B. Cockley, Solicitor for Complainant.
Tolles, Hogsett & Ginn, of Counsel.

[fol. 15] *Duly sworn to by R. W. Gallagher. Jurat omitted in printing.*

[fol. 16] EXHIBIT A TO BILL OF COMPLAINT

July 29, 1927.

The Tax Commission of Ohio, Columbus, Ohio.

Re, the East Ohio Gas Company 1927 Gross Receipts Return

GENTLEMEN: We hand you herewith the return of The East Ohio Gas Company of its gross receipts for the year 1927 on forms prescribed by your Commission. You will observe that this year we are returning as gross receipts of interstate business $20,799,907, and for intra-state business $6,831,811.

We desire to state for your benefit, fully and fairly, the facts which we think require this separation.

The East Ohio Gas Company is an Ohio corporation operating in the northern and eastern part of the state, Cleveland, Akron, Canton, Massillon and Youngstown being the largest communities in which it operates. A small part of its supply of natural gas comes from the Ohio fields, but the principal source of supply has for many years been the Hope Natural Gas Company of West Virginia. The contract between the Hope Company and The East Ohio Gas Company, of many years' standing, provides that the gas "shall be delivered by the Hope Company to the Ohio Company at the boundary line between the State of Ohio and the State of West Virginia", and the lines of the two companies are there connected. In other words, there is no interruption of the flow of gas from the time it leaves the West Virginia fields until it is consumed in customers' appliances.

As you know, the Attorney General has recently ruled under date of June 8th, 1927, in response to a letter from [fol. 17] your Commission concerning the W. Electric Company, that electric current similarly purchased in West Virginia and sold in Ohio in precisely the same manner as our gas is sold is interstate business, and the receipts therefrom are receipts from interstate business and not subject to an excise tax.

Likewise, the Supreme Court of the United States has held in the case of Peoples Gas v. Public Service Commission of Pennsylvania, 270 U. S., 550, 554, as follows:

"As respects the West Virginia gas we are of opinion, in view of its continuous transportation from the places

of production in one state to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point and show that the passing of custody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business. * * *"

In the above case the court had before it a situation precisely analogous to ours. There the Peoples Company was purchasing its principal supply of gas from the Hope Natural Gas Company under a contract precisely such as we have, which called for delivery at the state line. Mechanically, in that case as in ours, the pipe lines of the two companies were connected at the state line and there was no interruption whatever of the flow of gas, which was continuous from the fields to the consumers' meters. In the Peoples case the gas was actually metered at the boundary line, whereas, in our case, it is metered some distance back on the West Virginia side, a difference which, if it were of [fol. 18] any importance, but probably is not, will be in our favor rather than against us.

More recently still in the case of Public Utilities Commission v. Attleboro Company, 273 U. S. 83, the Supreme Court of the United States similarly held that the delivery of electric current at the state line by one company to another did not make the business intra-state business, but that it retained its character as interstate business.

These decisions, together with the Attorney General's opinion, seem to us clearly to cover the entire situation.

We shall be glad to furnish your commission or the Attorney General with any other information that you may desire and to file a more extended brief if it will be helpful. In the event that, for any reason, you are not inclined to follow this return in its separation of interstate and intrastate receipts, we respectfully request that before you determine the gross receipts of this company we may appear before the Commission and be heard in the matter of such determination.

Very truly yours, The East Ohio Gas Company, by R. W. Gallagher, President.

[fol. 19] EXHIBIT B-1-b TO BILL OF COMPLAINT

No. 20

Minimum Fee, $10.00. Columbus, Ohio.
Excepting S. C. F. L. Schedule 2.

State of Ohio, Department of Treasurer of State

Sec. General Code	Basis of tax	Rate, %	Amount of tax
Steam R. R., 5486	Intra-State	4	
Electric R. R., 5484	Gross Earnings	1.2	
Slp. Car, F. L. E., 5468	Proportion of Ohio Capital	1.35	
Pipe Line, 5487	Intra-State	4	
Exp. & Teleg., 5485		2	
Misc. Utilities, 5483	Gross Receipts, 6,831,811	1.35	92,229.45

Pay on or before December 15, 1927, to avoid 15% penalty.

The East Ohio Gas Co. R. W. Brink, Secy., 1405 E. 6th St., Cleveland, Ohio

NOTE.—If receipt is desired, send this statement and stub with check. This statement will then be returned, properly receipted.

EXHIBIT B-1-b TO BILL OF COMPLAINT

Combined Check and Receipt

The East Ohio Gas Company

Voucher No. L-78. Sub No. —.
Check No. 21504.

Cleveland, O., Dec. 13, 1927.

Paid Dec. 15, 1927.

Pay to the order of State of Ohio, Bert B. Buckley, Treasurer, $92,229.45, Ninety-two Thousand Two Hundred Twenty Nine Dollars Forty Five Cents, —— Dollars.

Endorsement hereof is receipt in full of voucher numbered as above.

The East Ohio Gas Company, by (Sgd.) W. H. Holtz, Assistant Treasurer.

To the Union Trust Company, Cleveland, Ohio.
6-10.

Endorsement on back: Endorsed by State of Ohio, Bert B. Buckley, Treasurer of State.

[fol. 20] Exhibit B-2-a to Bill of Complaint

No. 19

Minimum Fee, $10.00. Columbus, Ohio.
Excepting S. C. F. L. Schedule 2.

State of Ohio, Department of Treasurer of State

Sec. Genera lCode	Basis of tax	Rate, %	Amount of tax
Steam R. R., 5486.....	Intra-State	4	.....
Electric R. R., 5484.....	Gross Earnings.....	1.2	.....
Slp. Car, F. L. E., 5468.....	Proportion of Ohio Capital	1.35	.....
Pipe Line, 5487.....	Intra-State	4	.....
Exp. & Teleg., 5485.....	.....	2	.....
Misc. Utilities, 5483.....	Gross Receipts, 8,592,528.	1.35	115,999.13

Pay on or before December 15, 1927, to avoid 15% penalty.

The East Ohio Gas Co. R. W. Brink, Secy., 1405 E. 6th St., Cleveland, Ohio

Note.—If receipt is desired, send this statement and stub with check. This statement will then be returned, properly receipted.

Exhibit B-2-b to Bill of Complaint

Combined Check and Receipt

The East Ohio Gas Company

Voucher No. L-84. Sub No. —.
Check No. 31109.

Cleveland, O., Dec. 12, 1928.

Paid Dec. 14, 1928.

Pay to the order of State of Ohio, Bert B. Buckley, Treasurer, $115,999.13, One Hundred Fifteen Thousand Nine Hundred Ninety Nine and 13/100 Dollars.

Endorsement hereof is receipt in full of voucher numbered as above.

The East Ohio Gas Company, by (Sgd.) W. H. Holtz, Assistant Treasurer.

To the National City Bank, Cleveland.
6-12.

Endorsement on back: Endorsed by State of Ohio, Bert B. Buckley, Treasurer of State.

[fol. 21] EXHIBIT B-3-a TO BILL OF COMPLAINT

No. 19

Minimum Fee, $10.00. Columbus, Ohio.
Excepting S. C. F. L. Schedule 2.

State of Ohio, Department of Treasurer of State

Sec. Genera lCode	Basis of tax	Rate, %	Amount of tax
Steam R. R., 5486.....	Intra-State	4	.....
Electric R. R., 5484.....	Gross Earnings.....	1.2	.....
Slp. Car, F. L. E., 5468.....	Proportion of Ohio Capital	1.35	.....
Pipe Line, 5487.....	Intra-State	4	.....
Exp. & Teleg., 5485.....	.....	2	.....
Misc. Utilities, 5483.....	Gross Receipts, 9,525,176.	1.35	128,589.88

Pay on or before December 15, 1929, to avoid 15% penalty.

The East Ohio Gas Co. R. W. Brink, Secy., 1405 E. 6th St., Cleveland, Ohio

NOTE.—If receipt is desired, send this statement and stub with check. This statement will then be returned, properly receipted.

EXHIBIT B-3-b TO BILL OF COMPLAINT

Combined Check and Receipt

The East Ohio Gas Company

Paid Dec. 12, 1929.

Voucher No. L-93. Sub No. —.
Check No. 40746.

Cleveland, O., Dec. 10, 1929.

Pay to the order of State of Ohio, H. Ross Ake, Treasurer, $128,589.88, One Hundred Twenty Eight Thousand Five Hundred Eighty Nine and 88/100 Dollars.

Endorsement hereof is receipt in full of voucher numbered as above.

The East Ohio Gas Company, by (Sgd.) W. H. Holtz,
Assistant Treasurer.

To the Union Trust Company, Cleveland, Ohio.
6-10.

Endorsement on back: Endorsed by State of Ohio, H. Ross Ake, Treasurer of State.

[fol. 22] EXHIBIT C TO BILL OF COMPLAINT

State of Ohio, Office of the Attorney General, Columbus

January 16, 1930.

In reply refer to File No. PU-36267.

East Ohio Gas Company, R. W. Gallagher, 1405 E. 6th Street, Cleveland, Ohio.

GENTLEMEN: The following account against you, has been certified to this department for collection:

Omitted Amounts

1927 excise tax	$280,798.74	
Penalty	42,119.81	
		$322,918.55

1928 excise tax	275,076.28	
Penalty	41,261.44	
		316,337.72
1929 excise tax	278,692.87	
Penalty	41,803.93	
		320,496.80
		$959,753.07

Kindly send to me a certified check for the aforesaid amount, made payable to the Treasurer of State.

Trusting you will give this matter your prompt attention, I am,

Very truly yours, Gilbert Bettman, Attorney General.

[fols. 23 & 24] EXHIBIT D TO BILL OF COMPLAINT

March 20, 1930.

In the Matter of the Application of THE EAST OHIO GAS COMPANY for a Review and Correction of the Order of the Tax Commission Certifying Omitted Amounts of Gross Receipts of This Company to the Attorney General

The East Ohio Gas Company having filed an application for review and correction of the order of the Tax Commission made on January 13, 1930 by which it found certain amounts of gross receipts to have been omitted from the reports of the above applicant for the years and in the amounts as follows:

1927	$20,799,907.00
1928	20,37[illegible],021.00
1929	20,6[illegible],916.00

and the commission coming on this day to review its order of that date, re-affirms its former decision and requests the Attorney General to proceed to collect the tax thereon for the respective years as set out in the order of January 13, 1930.

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPLICATION FOR TEMPORARY INJUNCTION

To Honorable Myers Y. Cooper, Governor of the State of Ohio; Honorable Gilbert Bettman, Attorney General of the State of Ohio; Honorable Quincy A. Davis, John S. Edwards, and George C. Braden, Members of and Constituting the Tax Commission of Ohio; Honorable Clarence J. Brown, Secretary of State of Ohio; Honorable Joseph T. Tracy, Auditor of the State of Ohio; Honorable H. Ross Ake, Treasurer of the State of Ohio:

You and each of you are hereby notified that The East Ohio Gas Company, the above named complainant has filed its verified Bill of Complaint in the District Court of the United States for the Southern District of Ohio, Eastern Division, against The Tax Commission of Ohio, Quincy A. Davis, John S. Edwards and George C. Braden, as Members of The Tax Commission of Ohio, Joseph T. Tracy, Auditor of the State of Ohio, H. Ross Ake, Treasurer of the State of Ohio, Clarence J. Brown, Secretary of the State of Ohio, and Gilbert Bettman, Attorney General of Ohio, praying that a certain order of the Tax Commission of Ohio dated July 13, 1930, in fixing additional gross receipts for the [fol. 26] years 1927, 1928 and 1929 of the complainant as a public utility and the excise taxes based thereon be adjudged invalid and void and that the enforcement of said order and the collection of said taxes by any of the above named defendants be perpetually enjoined.

In such suit the complainant has moved for an interlocutory injunction to be in effect during the pendency of the suit enjoining the above named defendants and each of them from any proceedings to enforce said order and from any proceedings against the complainant for non-payment of said excise taxes. The motion for such interlocutory injunction will be heard in the United States District Court at the Court House thereof in the city of Columbus, Franklin County, Ohio, on the 7th day of June, 1930, at ten o'clock A. M.

William B. Cockley, Solicitor for the East Ohio Gas Company.

Service of the above notice is hereby acknowledged by copy thereof together with a copy of the Bill of Complaint this 2nd day of April, 1930.

Myers Y. Cooper, Governor of the State of Ohio; Quincy A. Davis, John S. Edwards, and George C. Braden, Members of and Constituting the Tax Commission of Ohio; Clarence J. Brown, Secretary of State of Ohio; Joseph T. Tracy, Auditor of the State of Ohio; H. Ross Ake, Treasurer of the State of Ohio; Gilbert Bettman, Attorney General of Ohio, by Gilbert Bettman, Attorney General, Solicitor for Myers Y. Cooper, Governor of the State of Ohio; Quincy A. Davis, John S. Edwards, and George C. Braden, Members of and Constituting the Tax Commission of Ohio; Clarence J. Brown, Secretary of State of Ohio; Joseph T. Tracy, Auditor of the State of Ohio; H. Ross Ake, Treasurer of the State of Ohio.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

This cause coming on to be heard on the verified bill of complaint, and on motion of the complainant, it is ordered that the defendants appear before the Judge of this District Court of the United States for the Southern District of Ohio and a Judge of the Circuit Court of the United States and another District Judge of the United States Court sitting to hear this matter on the 7th day of June, 1930, at 10 o'clock A. M., at the Court Room of the United States District Court at Columbus, Ohio, and then and there show cause, if any they have, why the interlocutory injunction therein prayed for should not issue.

It is further ordered that a copy of this Order, certified under the hand of the Clerk and seal of the Court, be served on each of the defendants and that hearing of this cause on an application for an interlocutory injunction be had and proceeded with in accordance with Section 266 of the Judicial Code of the United States as amended.

Dated at Columbus, Ohio, Eastern Division of the Southern District of Ohio, this 2nd day of April, 1930.

Benson W. Hough, Judge of the United States District Court for the Southern District of Ohio.

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE TAX COMMISSION OF OHIO, QUINCY A. DAVIS, John S. Edwards, and George C. Braden, as Members of the Tax Commission of Ohio; Joseph T. Tracy, Auditor of State of the State of Ohio; H. Ross Ake, Treasurer of State of the State of Ohio; Clarence J. Brown, Secretary of State of the State of Ohio, and Gilbert Bettman, Attorney General of the State of Ohio, to the Bill of Complaint of the Complainant Herein

The defendants, each of them, saving to themselves the right to claim and take by this their answer whatever advantages might have been secured by motion to dismiss said bill of complaint, for the reason that on its face it does not state a cause of action in equity, and saving to themselves, and each of them, every defense in point of law arising upon the face of the bill of complaint, as hereinafter made, file this their answer to said bill of complaint.

[fol. 29] 1. Defendants admit the matters and things set up in paragraph 1 of the bill of complaint, but in this behalf defendants aver that the plaintiff has not in said paragraph or elsewhere in said bill of complaint stated or alleged the citizenship and place of residence of said defendants or of any of them.

2. Defendants admit that the federal jurisdiction of this case is asserted by plaintiff on the ground that the excise taxes which the defendants have levied and threatened to collect from the plaintiff upon its gross receipts for the years 1927, 1928 and 1929, are upon gross receipts arising from interstate commerce and that the same are a burden upon interstate commerce, contrary to the provisions of Article I, section 8, of the Constitution of the United States; but defendants deny that the excise taxes levied upon the

gross receipts of the plaintiff for the years 1927, 1928 and 1929, or in any of said years, are upon gross receipts arising from interstate commerce or that the same are a burden upon interstate commerce, under the provisions of Article I, section 8, of the Constitution of the United States, or otherwise. The defendants admit that the amount in controversy in this case, exclusive of interest and costs, exceeds the sum or value of $3,000.

3. Defendants admit that the complainant is a natural gas company and a public utility, as defined by the statutes of Ohio, and that complainant is engaged in the transportation and distribution of natural gas to consumers in the northern and eastern parts of the state of Ohio and was so engaged at all times material in the consideration of this case. Defendants admit that the principal cities which the complainant serves are Cleveland, Akron, Canton, Massillon and Youngstown. Defendants have no knowledge or information as to whether now and at the other times material to this case the complainant was engaged in the production of natural gas nor as to the number of consumers of such natural gas nor as to the number of municipalities in which such consumers reside. Defendants have no knowledge or information as to whether the complainant owns or operates four trunk pipe lines extending from the Ohio River in Monroe and Belmont Counties to the complainant's distribution systems in various municipalities where [fol. 30] such natural gas is consumed. Defendants have no knowledge or information as to whether complainant owns any parcels of real estate or inventories of personal property in the counties mentioned and referred to in the third paragraph of the bill of complaint and defendants have no knowledge or information as to whether complainant owns the particular property therein described.

4. Defendants have no knowledge or information that during the years 1927, 1928 and 1929, approximately three-fourths of the supply of natural gas marketed by the complainant to its consumers in the state of Ohio was purchased by it either from The Hope Natural Gas Company, a corporation organized under the laws of West Virginia, with producing fields located in that state, or The Peoples Natural Gas Company, a corporation organized under the

laws of Pennsylvania, with producing fields located in that state. Defendants admit that the gas which was purchased of said The Hope Natural Gas Company and The Peoples Natural Gas Company during said years 1927, 1928 and 1929 was in each case delivered to the complainant at the Ohio state line and that at points on this line the transmission lines of the complainant connected with the transmission lines of The Hope Natural Gas Company and The Peoples Natural Gas Company. Defendants deny that all natural gas purchased by the complainant from said companies moved directly from the producing wells of said companies in West Virginia and Pennsylvania across the Ohio state line and through the complainant's transmission lines and distribution systems in Ohio directly to consumers' appliances without interruption from the time it left the producing wells outside of Ohio until it was burned in consumers' appliances in Ohio. Defendants have no knowledge or information as to whether pumping stations are maintained by said producing companies in their respective states or that the gas purchased of said producing companies was delivered into complainant's lines at sufficient pressure to deliver it at consumers' appliances. Defendants admit that the gas marketed by complainant in Ohio during the years 1927, 1928 and 1929, over and above that purchased by it from The Hope Natural Gas Company and The Peoples Natural Gas Company, came from producing fields in the state of Ohio, but defendants have no knowl- [fol. 31] edge or information as to the proportion of said Ohio gas to the total amount of gas marketed by complainant in the state of Ohio during said years. As to said natural gas obtained by complainant from Ohio gas producing fields and sold and marketed by it during said years 1927, 1928 and 1929, defendants aver that at various points in the state of Ohio such gas was pumped into the pipe lines of complainant carrying said West Virginia and Pennsylvania gas and was intermingled with said West Virginia and Pennsylvania gas before any of the gas sold by the complainant reached the burning appliances of complainant's consumers.

5. Defendants admit the matters and things and legal conclusions stated in the 5th paragraph of the bill of complaint.

6. Defendants admit that on or before August 1st in each of the years 1927, 1928 and 1929, complainant duly reported to the Tax Commissioner of Ohio, on forms submitted by the Tax Commission of Ohio, the amount of its gross receipts for the year ending April 30th of each of said years, in figures, manner and form, as set out in the 6th paragraph of the bill of complaint.

Defendants deny that the receipts so reported as receipts from interstate business were in their entirety receipts from the sale of gas purchased from The Hope Natural Gas Company or The Peoples Natural Gas Company and sold by the complainant in Ohio and deny that the receipts so reported by complainant as receipts from intrastate business were in their entirety receipts from the sale of gas produced or purchased and sold by the complainant in the state of Ohio. Defendants admit that said receipts reported as business done for the federal government were receipts from the sale of gas to the United States postoffices and hospitals. Defendants admit that the complainant accompanied the report of 1927 to the Tax Commission of Ohio with a letter advising said Tax Commission of the separation complainant had made in its report between receipts from interstate and intrastate business and that a true copy of said letter is marked "Exhibit A" and made a part of the bill of complaint, but defendants deny the materiality, relevancy or competency of said letter or of the statements therein contained.

[fol. 32] 7. Defendants admit the matters and things set out in the 7th paragraph of the bill of complaint.

8. Defendants admit the matters and things set out in the 8th paragraph of the bill of complaint.

9. Defendants admit the matters and things set out in the 9th paragraph of the bill of complaint.

10. Defendants admit the matters and things set out in the 10th paragraph of the bill of complaint.

11. Defendants admit the matters and things set out in the 11th paragraph of the bill of complaint.

12. The defendants admit that the gross receipts of the complainant certified by the Tax Commission of Ohio, as omitted for the years 1927, 1928 and 1929, by said order

of January 13, 1930, are gross receipts from the sales to the United States Government to the extent of $404.00 in 1927, $466.00 in 1928 and $519.00 in 1929. Defendants have no knowledge or information as to how much, if any, of the gross receipts of the complainant certified by the Tax Commission of Ohio as omitted for the years 1927, 1928 and 1929, by said order of January 13, 1930, were receipts from the sale in Ohio of natural gas purchased by the complainant from said supply companies in West Virginia and Pennsylvania. Defendants deny that said receipts or any part thereof were from interstate commerce.

Defendants deny that the action of said Tax Commission of Ohio, in including said gross receipts in said order and the action of the auditor of state of Ohio in fixing an excise tax thereon, are illegal and void for the reasons set out in the 12th paragraph of the bill of complaint or for any other reason, and defendants specifically deny that the effect of said order of the Tax Commission of Ohio, and of said action of the auditor of state of the state of Ohio is the imposition of a tax and burden upon interstate commerce, contrary to the commerce clause of the federal constitution, to-wit: Article I, section 8 thereof; and defendants deny that the statutes of the state of Ohio do not impose an excise tax upon the gross receipts of the complainant certified by the Tax Commission of Ohio as omitted for the years 1927, 1928 and 1929, by said order of January 13, 1930, other than such gross receipts as may have been from sales to the United States Government.

[fol. 33] 13. Defendants admit that by section 5506 of the General Code of Ohio it is provided that annually, on the day fixed for the payment of any excise tax required to be paid by law, such tax with any penalties subsequently accruing thereon, shall become a lien upon all property in this state of a public utility or corporation and such lien shall continue until such taxes, together with any penalties subsequently accruing thereon, are paid. Defendants admit that said taxes here in question so assessed, together with the penalties thereon, are now a lien on the real and personal property of complainant in the state of Ohio and that the same are a cloud upon the title of plaintiff to said property. Defendants deny that said taxes are illegal and invalid or that complainant has no adequate remedy for the

removal of the lien of said taxes otherwise than in a court of equity.

14. Defendants admit the matters and things set out in paragraph 14 of the bill of complaint.

15. Defendants deny that said defendants, or any of them, threaten to or will, unless restrained, exercise all or any of the powers or enforce against the complainant all or any of the penalties provided for by the statutes set out in plaintiff's bill of complaint, and deny that the complainant is threatened with the revocation and cancellation of its authority to do business in the state of Ohio or that it is threatened with a suit to enjoin its transaction of further business in Ohio. Defendants deny that said defendants or any of them threaten to or will, unless restrained by an order of this court, attempt to enforce and collect said additional excise tax fixed for the years 1927, 1928 and 1929, otherwise than by an action at law to be brought by and in the name of the state of Ohio against said complainant to be filed by the Attorney General in a court of competent jurisdiction in the state of Ohio, to obtain a judgment against said complainant for said additional taxes, fixed for the years 1927, 1928 and 1929, and thereby collect the same.

Defendants further answering say that they have no knowledge or information as to the amount of the annual business of complainant, and deny that by reason of the [fol. 34] matters and things set out in the 15th paragraph of said bill of complaint or otherwise, complainant has no relief save in a court of equity.

Wherefore, having fully answered, defendants pray that their defenses in point of law arising on the bill of complaint, and hereinbefore made in this their answer, may be disposed of by the court; that the application of the complainant for a temporary injunction may be denied; that the bill of complaint may be dismissed at the cost of complainant and that they, and each of them, may go hence without day and have judgment for their costs.

Gilbert Bettman, Attorney General; L. F. Laylin, Special Counsel; William J. Ford, Special Counsel, Solicitors for the Defendants.

[fols. 35-38] IN UNITED STATES DISTRICT COURT

Narrative Form of Testimony

Statement under Equity Rule 75, Section (b), of the Testimony and Proceedings at Hearing

Be it remembered, that on Saturday, June 7, 1930, on the hearing on the motion for an interlocutory injunction in the above entitled cause in the District Court of the United States for the Southern District of Ohio, Eastern Division, before the Honorable Smith Hickenlooper, Benson W. Hough and Robert R. Nevin, Judges of said Court, the following procedings were had:

Present: Mr. Wm. B. Cockley, on behalf of complainant; Messrs. Gilbert Bettman and L. F. Laylin, on behalf of defendants.

Pursuant to agreement of counsel in open court this cause was submitted for final determination upon an agreed statement of facts, offered and received in evidence, marked Exhibit "A", hereto attached, and made a part hereof.

[fol. 39] EXHIBIT "A"

IN UNITED STATES DISTRICT COURT

[Title omitted]

Agreed Statement of Facts

It is agreed between the complainant and the defendants herein, by their respective counsel, that in addition to the facts admitted by the pleadings herein filed the facts hereinafter stated are true. This agreed statement of facts will be introduced upon the final hearing of this cause by both parties without other or additional evidence. By agreeing to this statement of facts each of the parties hereto reserves full right to claim that any of the facts hereby stipulated are incompetent and immaterial upon the issues joined.

1. Parties.—The allegations contained in paragraph 1 of the Bill of Complaint describing the parties to this action are true. Each of the individual defendants named

herein is a citizen of Ohio residing in the Southern Judicial District of Ohio, Eastern Division.

[fol. 40] 2. Federal Jurisdiction.—The grounds of federal jurisdiction are correctly stated in paragraph 2 of the Bill of Complaint. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

3. General Nature of East Ohio's Business.—The complainant, hereinafter for convenience sometimes called "East Ohio," is a natural gas company and a public utility as defined by the Statutes of Ohio, engaged in the production, transportation and distribution of natural gas and during the years 1927, 1928 and 1929 was distributing natural gas to more than 450,000 consumers under local franchises authorizing the use of public streets for that purpose in more than 50 municipalities in the northern and eastern parts of the state of Ohio. The principal municipalities served by the complainant were Cleveland, Akron, Canton, Massillon, Youngstown, Niles, Warren and neighboring municipalities. East Ohio owns many parcels of real estate as well as large inventories of personal property distributed through 19 counties of the state of Ohio including the counties of Monroe, Belmont and Harrison within the eastern division of the southern district of Ohio. East Ohio owns in fee a parcel of real estate located in said judicial district and correctly described in paragraph 3 of the Bill of Complaint.

4. Hope Natural Gas Company.—The Hope Natural Gas Company, for convenience sometimes hereinafter called "Hope Company," is a corporation organized and existing under the laws of the state of West Virginia. Its principal business is the production of natural gas and the sale thereof to other companies for distribution. It has extensive natural gas fields in West Virginia, and has, since [fol. 41] the organization of the present East Ohio Gas Company in 1910, been its principal source of supply pursuant to a contract which, with subsequent modifications thereof, is incorporated herein as "Appendix A."

During the years 1927, 1928 and 1929 approximately 72% of East Ohio's supply of natural gas was purchased by it from the Hope Company pursuant to the terms of said contract.

More than 90% of all voting stocks of East Ohio, the Hope Company and The Peoples Natural Gas Company is owned by the Standard Oil Company of New Jersey and was so owned at all times herein material.

5. Collection of West Virginia Gas.—All gas delivered by the Hope Company to East Ohio passes through what is known as the Hope Company's Hastings Station located in the State of West Virginia approximately 25 miles south of the Ohio River. Into this station run a number of transmission lines from the various parts of the Hope Company's West Virginia fields. The gas flows from the producing wells in practically all instances by its natural pressure into what are known as field lines, and from these it passes into larger lines known as gathering lines and from the gathering lines into transmission lines that carry it to Hastings Station. At various places both along its transmission lines, gathering lines and in some instances even along field lines it maintains pumping stations for the purpose and with the effect of facilitating the transmission of gas through the lines. At Hastings Station the gasoline vapors are removed from the natural gas by what is known as the "absorption method." In this the gas is passed through large vertical steel tanks known as "absorbers." The gas is introduced at the bottom and passes out at the top while oil vapors are introduced at the top, passed [fol. 42] through a series of baffle plates and collected at the bottom. This oil absorbs the gasoline vapors. The process is continuous and during it there is no interruption of the flow of gas. After the extraction of the gasoline vapors the gas is then passed through a pumping station which maintains a pressure of 200 to 300 pounds per square inch in the Hope Company's transmission lines on the discharge side leading from the Hastings Station to the Ohio River, the exact amount of the pressure being dependent upon the time of the year and East Ohio's demand for gas.

6. River Crossing and Delivery of West Virginia Gas.—The transmission lines of East Ohio hereinafter described extend from the Ohio River northward and at the river crossing the transmission lines of the Hope Company and East Ohio are connected by devices known as river crossings. These consist of a number of smaller pipes laid across the Ohio River and connected on each side with the larger

transmission lines. Each smaller line can be separately closed at either side of the river so that in the event of a washout or leak the continuance of the principal supply will not be imperiled. These river crossings were originally installed by the Hope Company which thereafter billed East Ohio and was paid by it for that proportion of the river crossings north of low water mark on the Ohio side of the Ohio River. The gas flows continuously from the Hope Company's transmission lines on the West Virginia side through the smaller pipes of the river crossings into East Ohio's transmission lines on the Ohio side of the Ohio River.

7. East Ohio's Transmission Lines.—East Ohio owns and operates four transmission lines running from the Ohio River northward to what is known as "Gross Farm Sta-[fol. 43] tion" in Stark County, Ohio. One of these, an 18 inch line, runs from what is known as "Pipe Creek Station" in Belmont County, Ohio, and the other three—one 18 inch line and two 20 inch lines—from what is known as "Clarington Station" in Monroe County, Ohio. From Gross Farm Station two pipe lines—one 14 inch and one 16 inch—run northeasterly to pressure reducing stations near Youngstown, Warren and Niles, one 10 inch pipe line runs north to a pressure reducing station near Akron, and South to stations near Canton and Massillon, and three other pipe lines—two 18 inch and one 20 inch—run to pressure reducing stations in Cuyahoga County. These transmission lines all carry West Virginia gas except that during the year 1929 a small amount of Ohio gas was introduced into the 10 inch line from which Akron, Canton and Massillon are supplied with West Virginia gas. The four transmission lines from the Ohio River to Gross Farm Station average 82 miles in length, the two from Gross Farm Station to Youngstown, 43 miles in length, and the three from Gross Farm Station to Cuyahoga County stations 40 miles in length. A map showing these transmission lines is incorporated herein as "Appendix B." The West Virginia gas leaves Hastings Station at a pressure varying between 200 to over 300 pounds, which is sufficient to transport it to East Ohio's consumers. East Ohio maintains no pumping stations for the transportation of West Virginia gas. The gas flows northward in the transmission system hereinbefore described until it reaches pressure reducing stations at which point the transmission lines are connected

with the high pressure distribution lines that are a part of the distribution system in each municipality served.

8. Ohio Gas.—East Ohio procured about one-fourth of its supply during the years 1927, 1928 and 1929 from its own [fol. 44] producing fields, principally in Knox, Holmes, Wayne, Summit, Medina and Cuyahoga Counties, Ohio. The gas from Medina and Cuyahoga Counties is transported by a number of small transmission lines and introduced at various places into the Cleveland metropolitan district high pressure distribution system. The gas from Knox, Holmes, Wayne and Summit Counties is carried by transmission lines to a pressure reducing station about 4 miles west of Akron from which point one line carries it to Akron and another line without passing through the pressure reducing station carries it north to a pressure reducing station in Cuyahoga County.

9. Pennsylvania Gas.—The Peoples Gas Company, hereinafter for convenience sometimes called "Peoples Company," is a natural gas company organized and existing under the laws of Pennsylvania with producing fields in that state. It collects its supply of natural gas in Pennsylvania by the same means as those of the Hope Company hereinbefore described and transports it to what is known as "Darlington Station" located in Pennsylvania approximately 8 miles east of the Ohio-Pennsylvania line where, after the removal of gasoline vapors, it is pumped to a pressure of 100 to 300 pounds per square inch, sufficient to carry it to East Ohio's consumers' appliances, and transported by it to the Pennsylvania-Ohio state line. At that point the Peoples Company's transmission line is connected with a similar transmission line of East Ohio through which the gas then passes to Youngstown and neighboring communities. During the years 1927, 1928 and 1929 East Ohio purchased approximately 3% of its supply of natural gas from the Peoples Company, all gas being measured by meters maintained by the Peoples Company in Pennsylvania near the Ohio line and payment for gas being made on the basis of such meter readings.

[fol. 45] 10. Method of Distribution to Consumers.—At the pressure reducing stations located on the outskirts of the various municipalities served, the gas passes from the transmission lines through regulators into the high pres-

sure lines that are a part of the distribution system in each municipality served. These regulators are set at the number of pounds pressure it is desired to maintain in the high pressure distribution lines—30 to 50 pounds per square inch depending on the size of the municipality and the demand for gas. These regulators automatically permit a faster or slower flow of gas from the transmission lines into the high pressure distribution lines to maintain in them the pressure at which regulators are set and gas is constantly flowing through these regulators at a slower or faster rate depending upon demand. In those communities hereinafter specified where mixed Ohio and West Virginia gas is served the commingling of the gas occurs in the high pressure distribution lines. From the high pressure distribution lines the gas then enters in each municipality the low pressure distribution lines where the pressure is again reduced to the number of ounces necessary to provide adequate pressure to consumers' appliances. Between the high pressure and low pressure distribution lines are other regulators precisely similar in their operation to those hereinbefore described which maintain the number of ounces on the low pressure lines at which they are set by allowing a slower or faster flow of gas, depending upon demand. Gas at the pressures carried in the transmission and high pressure distribution lines is unsuitable for use by domestic consumers. From the low pressure lines the gas passes directly through service lines from the street mains to consumers' meters and appliances. Service lines are installed [fol. 46] at the expense of and are owned by the property owner. At or near the connection of each street main with the service line is a stopcock under the control of East Ohio for shutting off and turning on the supply. Stopcocks by which the consumer can control the flow of gas are also located on the inlet side of the meter and at consumers' appliances. Gas in the service lines is stationary at such times as the consumers' appliances are not in use. The number of East Ohio's consumers is constantly changing. Changes of residence by consumers require the shutting off of gas at the old location and turning on at the new location. Likewise a consumer moving out of the municipalities served by East Ohio requires the gas to be turned off at the location served until a new occupant moves in when service is re-

sumed. While these changes are frequent over the entire system the total number served is constantly increasing. The pipes in the high pressure distribution systems of the various municipalities vary in size from 2 inches to 20 inches in diameter, in the low pressure distribution systems from 2 inches to 30 inches in diameter, and the service lines for domestic consumers from 1 inch to 3 inches in diameter and for industrial consumers from 1½ inches to 8 inches in diameter.

10-A. Relationship Between East Ohio and Its Consumers.—In the principal municipalities served by it East Ohio maintains local offices, and each domestic consumer in order to secure gas is required to sign there an application blank in substantially the following form:

"I, —— ——, hereby make application to The East Ohio Gas Company for natural gas to be supplied to the above premises, occupied as a —, and agree to pay for the same promptly at the rate fixed by the Company's ordinance and in accordance with the Rules and Regulations of the Company, subject to line extension.

[fol. 47] "I also agree to observe all of the Rules and Regulations of the Company; to pay for all gas used on said premises until forty-eight (48) hours after notice, in writing, has been duly given at the office of the company to discontinue the supply; to pay any charges in connection with setting and/or turning on meter; to permit the agents of the Company to have free access to the gas meter, pipes and connections at any time and to remove the meter for any purpose; and upon failure to comply with any of the Rules and Regulations of the Company, or for any indebtedness whatsoever, to permit the agents of the Company to sever connections with the gas service."

The amount of gas consumed by each consumer is determined by meter readings made monthly, the meters being located on the consumer's premises. East Ohio's rate schedules in many of the municipalities served by it provide for a service charge to be paid each month in addition to the price of gas. In a few municipalities there is no service charge but in lieu thereof a minimum charge is in effect, by which a consumer is required to pay a certain sum whether the amount of gas represented thereby at the scheduled rate

equals that amount or not, or whether the consumer uses any gas. East Ohio in the various communities served by it has employes whose duty it is to make connections and disconnections, turn on and turn off the gas, maintain and replace mains and service pipes, as the necessities of its business require. In a few of the municipalities served, East Ohio sells various appliances for the utilization of natural gas.

11. East Ohio's Report of Gross Receipts.—On or before August first in each of the years 1927, 1928 and 1929 East Ohio reported to the Tax Commission of Ohio, as required by the Statutes of Ohio, on forms approved by said Commis- [fol. 48] sion, the amount of its gross receipts for the year ending April 30th preceding, as follows:

	1927	1928	1929
Entire receipts from intra-state business (exclusive of business done for the Federal Government)	6,831,811	8,592,528	9,525,176
Intra-state business done for Federal Government	404	466	519
Entire receipts from interstate business (exclusive of business done for the Federal Government)	20,799,907	20,374,214	20,643,916
Interstate business done for Federal Government	1,398	1,341	1,262
Total	27,633,520	28,968,549	30,170,873

Subject to a correction of figures, hereinafter noted in paragraph 16 hereof, the receipts so reported as receipts from interstate business were the receipts from the sale of gas purchased from the Hope Company and the Peoples Company and sold by East Ohio in Ohio, and the receipts so reported as receipts from intra-state business were receipts from the sale of gas produced or purchased and sold by East Ohio in Ohio as well as miscellaneous receipts from business other than the sale of natural gas. The receipts reported as business done for the Federal Government were receipts from the sale of gas to United States post offices and hospitals. East Ohio accompanied the report of 1927 to the Tax Commission with a letter, a true copy of which is marked "Exhibit A," attached to and made a part of the Bill of Complaint. Prior to the year 1927 for some years East Ohio reported and paid the excise tax on its entire gross receipts irrespective of the source of supply from which the gas it sold to consumers was received.

12. Original Determination and Payment of Tax.—In each of the years 1927, 1928 and 1929 the Tax Commission of Ohio, acting pursuant to the Statutes of Ohio, fixed the intra-state gross receipts of the complainant and certified the same to the Auditor of State in the following amounts:

[fol. 49] Intrastate Gross Receipts

1927	$6,831,811
1928	8,592,528
1929	9,525,176

Thereafter in each year the Auditor of State computed the tax on the gross receipts so certified to him at the rate of one and thirty-five one-hundredths per cent and certified the tax so computed to the Treasurer of State who rendered statements therefor to East Ohio. Thereafter in each year and prior to December fifteenth, the last day provided by law for the payment of the same, East Ohio paid said excise taxes to the Treasurer of the State of Ohio. The amount of taxes so computed, certified, billed and paid was:

1927	$92,229.45
1928	115,999.13
1929	128,589.88

True copies of said bills from the Treasurer of the State of Ohio, and of the checks in payment of the same are marked Exhibits "B-1a", "B-1b", "B-2a", "B-2b", "B-3a", and "B-3b", attached to and made a part of the Bill of Complaint.

13. The Tax Commission's Order of 1930.—On January 13, 1930, the Tax Commission of Ohio made the following order:

"In the Matter of Omitted Amounts of Certain Public Utilities

"The Commission this day proceeding to review the amounts heretofore found by it to have been omitted by certain public utilities as named in Duplicate No. 401, and said companies having been notified of the amounts so fixed as aforesaid and offered opportunity to be heard in the matter

of such omitted amounts of gross receipts, and having care-
[fol. 50] fully and fully considered all facts submitted and all other facts and information coming to its knowledge, orders that the amounts of such omitted gross receipts be and the same are finally fixed and determined to be the amounts as set out in the accompanying schedule; and further orders that the schedule be certified to the Attorney General with the request that he institute such action as may be proper or necessary in the Court of Common Pleas of Franklin County or of any county in which such companies are doing business or own property for the collection of such fees and penalties."

In the schedule accompanying said order the Tax Commission of Ohio found and certified what it designated as "omitted gross receipts" of East Ohio as follows:

1927	$20,799,907
1928	20,376,021
1929	20,643,916

Said order of January 13, 1930, was certified to the Auditor of State by the Tax Commission of Ohio and on or about the same date said auditor computed the excise taxes thereon at the rate of one and thirty-five one-hundredths per cent, together with penalties of fifteen per cent, and delivered the same to the Attorney General of Ohio for collection. The amount of taxes and penalties so certified for collection are as follows:

1927 excise tax	$280,798.74	
Penalty	42,119.81	
		$322,918.55
1928 excise tax	275,076.28	
Penalty	41,261.44	
		316,337.72
1929 excise tax	278,692.87	
Penalty	41,803.93	
		320,496.80
		959,753.07

[fol. 51] 14. Demand for Payment of Additional Tax.—On or about January 16, 1930, the Attorney General of

Ohio notified East Ohio that the amounts hereinbefore set forth had been certified to him for collection and demanded immediate payment thereof. A true copy of such notice and demand is marked "Exhibit C", attached to and made a part of the Bill of Complaint.

15. Application for a Rehearing.—On March 13, 1930, and within sixty days from the date of said order of January 13, 1930, East Ohio duly filed with the Tax Commission of Ohio an application for a review and rehearing of said order as permitted by General Code Section 5517 and thereafter the same was denied by the Tax Commission of Ohio. A true copy of the order denying said application is marked "Exhibit D", attached to and made a part of the Bill of Complaint.

16. Corrected Statement of East Ohio's Gross Receipts.—At the time of the filing of the annual reports with the Tax Commission the division of gross receipts therein made between intra-state business and interstate business was made by apportioning all of East Ohio's receipts from the sale of gas in Ohio on the basis of the total quantities of West Virginia and Pennsylvania gas purchased and the total quantity of gas produced and purchased in Ohio. However, a number of municipalities were supplied entirely during the years in question with Pennsylvania or West Virginia gas, others entirely with Ohio gas and in others mixed Ohio and West Virginia gas was used. In addition, receipts of East Ohio from service and minimum charges were treated as receipts from the sale of gas whereas East Ohio now admits these receipts to be intra-state receipts. A corrected statement of gross receipts on this basis is as follows:

[fol. 52]	1927	1928	1929
Receipts from sales to consumers supplied 100% with West Virgina gas.	$7,361,348	$8,174,145	$6,114,965
Receipts from sales to consumers supplied 100% with Pennsylvania gas.	874,586	778,162	790,488
Receipts from West Virginia gas sold in municipalities where Ohio and West Virginia gas is mixed	11,180,408	9,919,192	12,221,751
Receipts from business done for the Federal Government	1,802	1,807	1,781
Receipts from sale of Ohio gas and other intra-state business	8,215,381	10,095,243	11,042,088
Total Gross Receipts	$27,633,520	$28,968,549	$30,170,873

Mixed Ohio and West Virginia gas is sold in Akron, Cleveland and some other municipalities in the Cleveland metropolitan district and during the year 1929 for a short time in Canton and Massillon.

Transmission lines convey separately the Ohio and West Virginia gas to the high pressure distribution lines serving these communities and the gas from the two sources is commingled in the distribution systems. The receipts given above as "Receipts from West Virginia gas sold in municipalities where Ohio and West Virginia gas is mixed" are that proportion of the yearly gross receipts of East Ohio from the sale of gas in the municipalities served with mixed Ohio and West Virginia gas represented by the percentage of West Virginia gas put into the distribution systems of those communities each year, such gas as well as the Ohio gas being separately measured at border meters at the time of its introduction into the distribution systems.

A detailed statement of the apportionment of receipts from the sale of this gas is as follows:

[fol. 53]

1927

Cities served with mixed Ohio & W. Va. gas	Per cent Ohio gas	Per cent W. Va. gas	Gross receipts from Ohio gas	Gross receipts from W. Va. gas
Cleveland City	23.338	76.662	$2,732,704.24	$8,976,543.52
Lakewood	23.338	76.662	263,886.96	866,530.99
Garfield Heights	23.338	76.662	37,522.46	123,255.93
Newburgh Heights	23.338	76.662	7,774.38	25,537.72
Cuyahoga Heights	23.338	76.662	1,465.14	4,812.79
Brooklyn Heights	23.338	76.662	2,565.27	8,426.54
Fairview	23.338	76.662	6,434.63	21,136.83
North Olmstead	23.338	76.662	3,728.18	12,246.56
Rocky River	23.338	76.662	10,488.40	34,452.89
Bratenahl	23.338	76.662	13,230.62	43,460.69
Akron	49.062	50.918	1,025,343.73	1,063,696.55
			4,105,144.01	11,180,403.01

1928

Cities served with mixed Ohio & W. Va. gas	Per cent Ohio gas	Per cent W. Va. gas	Gross receipts from Ohio gas	Gross receipts from W. Va. gas
Cleveland City	28.607	71.393	$3,322,440.36	$8,291,641.36
Lakewood	28.607	71.393	315,530.68	787,453.4[illegible]
Garfield Heights	28.607	71.393	54,723.53	136,570.68
Newburgh Heights	28.607	71.393	9,239.79	23,059.25
Cuyahoga Heights	28.607	71.393	14,210.26	35,463.81
Brooklyn Heights	28.607	71.393	6,033.15	15,056.61
Fairview	28.607	71.393	8,293.46	20,697.54
North Olmstead	28.607	71.393	4,667.79	11,649.15
Rocky River	28.607	71.393	14,393.79	35,921.84
Bratenahl	28.607	71.393	17,226.79	42,991.78
Akron	78.922	21.078	1,942,110.45	518,686.85
			5,708,869.96	9,919,192.36

1929

Cities served with mixed Ohio & W. Va. gas	Per cent Ohio gas	Per cent W. Va. gas	Gross receipts from Ohio gas	Gross receipts from W. Va. gas
Cleveland City	30.212	69.788	$3,663,583.23	$8,462,668.68
Lakewood	30.212	69.788	328,151.36	758,010.98
Garfield Heights	30.212	69.788	65,129.50	150,445.44
Newburgh Heights	30.212	69.788	9,081.24	20,977.12
Cuyahoga Heights	30.212	69.788	30,165.34	69,680.21
Brooklyn Heights	30.212	69.788	3,931.30	9,081.07
Fairvew	30.212	69.788	9,571.65	22,109.97
N. Olmstead	30.212	69.788	4,936.19	11,402.32
Rocky River	30.212	69.788	18,538.42	42,822.68
Bratenahl	30.212	69.788	18,153.57	41,933.71
Akron	91.377	8.623	2,372,493.92	223,885.33
Canton	3.735	96.265	75,263.85	1,939,832.60
Massillon	5.290	94.701	26,237.35	468,900.43
			6,625,256.92	12,221,751.04

[fol. 54] East Ohio has no available records showing the exact proportion in which gas from the two sources is commingled on any given date, either in the several municipalities or as served to individual consumers therein. Upward sliding scale rates are in force in all these municipalities and while there is some variation in the rate structures the average price per thousand cubic feet for all gas sold in these separate municipalities is practically the same.

The receipts listed as "Receipts from business done for the Federal Government" are receipts from sales of gas to United States post offices and hospitals and are admittedly not subject to the excise tax.

The receipts listed as "Receipts from sale of Ohio gas and other intra-state business" include all receipts from service and minimum charges, all receipts from the sale of gas in municipalities served entirely with Ohio gas and the apportioned receipts from communities served with mixed Ohio and West Virginia gas represented by the percentage of Ohio gas put into the distribution systems each year in those communities. In addition this item includes miscellaneous revenues of East Ohio from rental of buildings and other income.

A comparison of the receipts designated as intrastate business, exclusive of business done for the Federal Government, as originally reported to the Tax Commission and as now corrected is as follows:

	1927	1928	1929
As corrected	$8,215,381	$10,095,243	$11,042,038
As reported	6,831,811	8,592,528	9,525,176
Difference	1,383,570	1,502,715	1,516,862

Since the institution of this suit East Ohio has paid the additional excise taxes shown by this comparison to be due [fol. 55] for the years 1927, 1928 and 1929 in the following amounts:

	Tax
1927	$18,678.19
1928	20,296.65
1929	20,477.64

17. East Ohio Property Taxes.—In addition to the excise taxes paid by East Ohio for the three years in question, real and personal property owned by it in the State of Ohio in connection with the conduct of its business was assessed by local taxing authorities and by the Tax Commission of Ohio, and property taxes were levied thereon and paid by East Ohio as follows:

	Assessed value of real estate and buildings	Assessed value of personal property	Assessed value of all property	Taxes paid	Average rate
1927	$3,668,760	$41,871,570	$45,540,330	$1,008,610	2.21%
1928	3,717,470	42,889,900	46,607,370	1,044,917	2.24%
1929	3,672,450	44,079,350	47,751,800	1,108,628	2.32%

18. Enforcement of Tax.—The defendants named in the Bill of Complaint expect to and will unless restrained by order of this Court exercise the powers respectively conferred upon them by the Statutes of the State of Ohio to enforce against and collect from The East Ohio Gas Company the taxes and penalties for which demand has been made upon East Ohio for the years 1927, 1928 and 1929 as hereinbefore set forth.

Tolles, Hogsett & Ginn and William B. Cockley, Attorneys for Complainant. Gilbert Bettman, Attorney General of Ohio; Lewis F. Laylin, Chief Counsel for the Attorney General, Attorneys for Defendants.

[fol. 56] APPENDIX "A" TO AGREED STATEMENT OF FACTS

Gas Purchase Agreements

Hope Natural Gas Company & The East Ohio Gas Company

Original Agreement—March 1, 1910

This agreement, made and entered into this 1st day of March, A. D. 1910, by and between the Hope Natural Gas

Company, a West Virginia corporation, hereinafter called the "Hope Company," party of the first part, and The East Ohio Gas Company, an Ohio corporation, hereinafter called the "Ohio Company," party of the second part,

Witnesseth: Whereas, the Hope Company is the owner of natural gas wells, gas rights and leases for gas purposes in the State of West Virginia, and is the owner of pipe lines extending from its natural gas territory in the State of West Virginia to the boundary of the State of Ohio on the Ohio River; and

Whereas, the Ohio Company holds franchises and distributing systems for the distribution of natural gas in the City of Cleveland and other cities, villages and towns in the State of Ohio, and is the owner of three trunk lines extending from the boundary of the State of Ohio on the Ohio River, through the State of Ohio to the City of Cleveland, and connecting with distributing systems owned by the said Ohio Company in the City of Cleveland, and in various cities, villages and towns in the State of Ohio:

Now, therefore, in consideration of the premises and of the mutual covenants and agreements herein contained, the parties hereto have agreed and do hereby agree as follows:

[fol. 57] First. It is mutually understood and agreed that all the rights of the parties hereto in respect to natural gas sold and delivered by the Hope Company to the Ohio Company on and after March 1st, 1910, shall be ascertained and determined by and in accordance with the provisions of this agreement.

Second. The Hope Company undertakes and agrees during the continuance of this contract to sell and deliver to the Ohio Company and the Ohio Company undertakes and agrees to purchase and take from the Hope Company—

(a) All the natural gas requisite for the supply of the domestic consumers of the Ohio Company;

(b) Such amounts of natural gas as may be requisite to fulfill contracts made with the consent and approval of the Hope Company by the Ohio Company, or companies which it supplies with natural gas, for the sale of gas upon special terms and conditions for manufacturing purposes;

provided, however, that the Hope Company shall not be obligated to sell and deliver or the Ohio Company to purchase and take gas in excess of the amounts currently required for the purposes aforesaid, or in excess of the amount which can be transported through the trunk lines of the Ohio Company as at present constructed under a pressure of 225 pounds at the Ohio River and that the Hope Company cannot be required to deliver gas in excess of the amount which it has available for delivery as defined in the Seventh Paragraph hereof.

The Ohio Company further undertakes and agrees that if at any time its requirements of natural gas for the purposes aforesaid exceed the amount which can be transported through its trunk lines from the Ohio River as at present constructed, it will purchase such excess from the Hope [fol. 58] Company on the terms herein stated to the extent that the Hope Company is willing and able to furnish the same, and the trunk lines of the Ohio Company from the Ohio River are then sufficient to transport the same, provided, however, that if at any time the Ohio Company shall give written notice to the Hope Company of its intention to increase by new construction the then existing capacity of its pipe lines from the Ohio River within one year from the date of such notice by an amount designated in such notice and does so increase its pipe line capacity within such year, the Hope Company shall not be entitled to require the Ohio Company to purchase and take natural gas hereunder in excess of the capacity of the trunk lines from the Ohio River as they existed prior to such increase under a maximum pressure of 225 pounds at the Ohio River, unless within sixty days after the receipt of such written notes, it serves on the Ohio Company written notice that for the purposes of this agreement the capacity of the trunk lines from the Ohio River as increased by such additional construction under a maximum pressure of 225 pounds at the Ohio River shall be substituted for the existing capacity of said trunk lines.

Third. It is mutually understood and agreed that the natural gas to be sold and delivered hereunder shall be delivered by the Hope Company to the Ohio Company at the boundary line between the State of Ohio and the State of West Virginia at the points where the lines of the Hope

Company now connect with the trunk lines of the Ohio Company, or at such other points as may be mutually agreed upon between the parties hereto.

Fourth. It is further mutually understood and agreed that no dominion or control over the natural gas delivered under this contract shall remain in the Hope Company after [fol. 59] the gas passes the points of delivery above stated, nor shall the Hope Company be responsible for or on account of anything that may thereafter be done, happen or arise touching said gas; and the Ohio Company undertakes and agrees that it will at all times and from time to time keep free, save harmless and indemnify the Hope Company from any and all manner of claims, suits and damages on account of any contract, act or thing touching the said gas after it has left the said point of delivery.

Fifth. The Hope Company undertakes and agrees subject to the provisions of Paragraph Seventh hereof that all times during the continuance of this contract it will maintain in good order and condition all its compressing stations, pipe lines, connections and other facilities in the State of West Virginia in order to enable it to carry out its obligations under this contract, and to deliver gas hereunder in such volume as to maintain a pressure equivalent to 225 pounds at the junction point of its lines with the lines of the Ohio Company as at present constructed and operated at the Ohio River; and will use due and reasonable diligence in developing its gas leases and properties in the State of West Virginia and in obtaining gas therefrom for the purpose of fulfilling its obligations hereunder, and will, if and when required so to do by the Ohio Company, deliver the gas to be supplied by it hereunder at a pressure equivalent to 225 pounds at the Ohio River end of the trunk lines of the Ohio Company as at present constructed.

Sixth. It is mutually understood and agreed that where either party to this contract fails to perform any obligation herein assumed by it, and such failure is due to Acts of God, or a public enemy, strikes, riots, injunctions, or other interferences through legal proceedings, breakage or acci- [fol. 60] dent to machinery or lines of pipe, washouts, earthquakes, storms, freezing of lines, or wells, sudden or unforeseen failure of gas wells, or to any cause not due to the fault

or neglect of such party, or is caused by the necessity for making repairs or alterations in machinery or lines of pipe, such failure shall not be deemed to be a violation by such party of its obligations hereunder, but such party shall use due diligence to again put itself in position to carry out all of the obligations which by the terms hereof, it has assumed.

Seventh. It is further understood and agreed between the parties hereto that this contract shall continue, unless previously terminated by mutual consent of the parties hereto, so long as the Hope Company produces gas in marketable quantities from the gas fields owned or leased by it in West Virginia, but that the Hope Company reserves the right to make and enter into contracts with other companies for the sale to such companies of natural gas and in the ordinary course of its business to sell and dispose of the gas properties now or hereafter owned or leased by it; but it is understood and agreed that the Hope Company is obligated to deliver gas for domestic consumers of the Ohio Company in preference to all other consumers, or persons, firms and corporations distributing gas under contracts with the Hope Company, excepting only the domestic consumers on the lines of the Hope Company in West Virginia, and the consumers paying domestic rates upon the distributing systems owned or supplied with gas by The Peoples Natural Gas Company which is now obtaining gas from the Hope Company; and that in case at any time during the continuance of this contract the natural gas produced in the gas fields then owned and leased by the Hope Company is not suffi- [fol. 61] cient to fill the requirements of domestic consumers on distributing systems which at such time are purchasing natural gas from the Hope Company, the Ohio Company shall not be entitled to require the Hope Company to supply to it under this contract a greater amount of natural gas than the proportion of the natural gas produced by the Hope Company from the properties then owned or leased by it, which the number of domestic consumers supplied by the Ohio Company bears to the total number of domestic consumers on the distributing systems owned or supplied by the Ohio Company and the consumers paying domestic rates on distributing systems owned or supplied with gas by The Peoples Natural Gas Company, and that the domestic consumers of the Hope Company in West Vir-

ginia may at all times be supplied in full by the Hope Company, so that, for the purposes of this contract, the gas produced by the Hope Company will be the total amount produced by it after deducting the amount requisite for the supply of its domestic consumers in West Virginia.

Eighth. It is mutually understood and agreed that the Ohio Company shall keep the Hope Company at all times fully informed of all facts tending to show the amount of natural gas which will be necessary from time to time to supply its requirements hereunder, and that so long as the Hope Company exercises due diligence in making provision to supply or does supply the amount of natural gas estimated to be necessary to meet such requirements, it shall not be liable by reason of its failure to supply gas in excess of said estimated amount.

Ninth. The Ohio Company undertakes and agrees at all times during the continuance of this contract that the trunk lines from the Ohio River to the City of Cleveland and all branches therefrom and the various distributing systems [fol. 62] connected therewith will be kept in good order and condition, so as to reduce, as far as possible, the waste and escape of gas, and that all gas supplied by it to domestic consumers or for manufacturing purposes shall be measured by standard meters which it will install and keep in good order and condition, and that all gas supplied to consumers by companies to which it sells gas shall be measured by similar meters, which, together with all other pipe and appliances of such companies, the Ohio Company agrees shall be kept in good order and repair; that all of said meters used for measuring gas sold for domestic purposes shall be read at least once in each calendar month and that meters used for measuring gas sold for manufacturing purposes pursuant to the provisions hereof, shal be read daily and that reports of the readings of all meters shall be furnished monthly to the Hope Company. The amount of gas sold for lighting streets where measurement by meter is impracticable, shall be estimated monthly as accurately as practicable, and the amount of such monthly estimates and the basis upon which each of said estimates is made shall be reported monthly to the Hope Company.

Tenth. The Ohio Company further undertakes and agrees that the Hope Company shall at all times through its agents

and representatives have access to all meters used by the Ohio Company or by companies to which it sells gas to measure the amount of gas sold to consumers, whether for domestic purposes or for manufacturing purposes, and to all pipes, appliances and apparatus used by such companies in transporting, distributing and delivering gas, with the right to require the Ohio Company to examine, test and repair such meters, pipes and apparatus; on the refusal, delay or failure of the Ohio Company so to do, the Hope [fol. 63] Company, by its duly authorized agents and employes, shall have access to such meters, pipes, appliances and apparatus, with the right to examine, test, repair and replace the same (in workmanlike manner as it would its own meters and appliances) but at the cost of the Ohio Company; the Hope Company by its properly accredited representatives shall also at all times have the right to examine the books of account of the Ohio Company and of each of the companies to which the Ohio Company supplies natural gas, so far as said books of account in any way relate to the purchase or distribution of natural gas.

Eleventh. It is mutually understood and agreed that for the purposes of this contract "gas sold for domestic purposes" and "gas sold to domestic consumers" shall be deemed to include all gas sold for household use or at the same rates and upon the same terms and conditions upon which gas is sold for household use; also gas sold to churches, schools and similar institutions at reduced rates but for the same purposes and upon the same terms and conditions for which and upon which gas is sold for household use; also gas sold for street lighting; and that the terms "manufacturing gas" and "gas sold for manufacturing purposes" shall be deemed to include all gas, other than as aforesaid, sold upon special terms and conditions; it is also agreed that where this contract uses the words "consumers of the Ohio Company," or "consumers supplied by the Ohio Company," such words or terms include also consumers of local distributing companies supplied with gas by the Ohio Company.

Twelfth. Any gas that may be used by the Ohio Company or any company which it supplies with natural gas, for the operation of compressing stations or other plants owned by it, or for lighting or heating its own buildings, shall be

[fol. 64] deemed to be gas sold for domestic purposes, at the prevailing domestic rates, unless a special agreement is made in reference thereto with the Hope Company.

Thirteenth. Notwithstanding anything in this contract contained, the Ohio Company may continue to market the gas from certain wells in Mahoning County in the State of Ohio now being operated by it, but such gas is to be measured before commingling in a manner satisfactory to the Hope Company and is to be deemed, for the purposes of this contract, as gas delivered for manufacturing purposes at the average rate currently charged per month for manufacturing purposes and deducted at that rate from the monthly settlements with the Hope Company.

All contracts made by the Ohio Company or companies supplied by it with gas for the sale of gas for manufacturing purposes shall be submitted to the Hope Company and, if approved by the Hope Company, the provisions of this contract shall apply thereto; if, however, any of said contracts are not approved by the Hope Company, the Ohio Company shall be under no obligation to purchase and take from the Hope Company, nor shall the Hope Company be under any obligation to sell and deliver to the Ohio Company, the amount of gas requisite to fulfill the same, and this contract shall in no wise restrict the right of the Ohio Company to enter into such contracts and to purchase and supply from other sources the natural gas requisite for the fulfillment of the contracts which the Hope Company has not approved.

When the production of the Hope Company shall have declined so that the amount of gas available for delivery hereunder during January and February will not maintain a pressure of 225 pounds at the Ohio River on the lines of [fol. 65] the Ohio Company as now constructed, and will not supply the amount of gas requisite for the domestic consumers of the Ohio Company during such months, the amount of gas which the Ohio Company shall be obligated to purchase and take from the Hope Company and the Hope Company to sell and deliver hereunder on account of domestic consumption after any January and February in which there is such a deficiency in the available supply, may, at the option of the Ohio Company, be limited to the proportion that the amount delivered by the Hope Company

during said months of January and February bears to the amount which was required by said Ohio Company in said months for the supply of its domestic consumers (not exceeding, however, the amount which could have been transported under the pressure as aforesaid). Said option shall be exercised on or before June 1st by written notice from the Ohio Company to the Hope Company.

Notwithstanding the exercise of such option, the provisions of Paragraph Sixteenth hereof shall nevertheless continue applicable for the purpose of determining the price to be paid for gas actually delivered by the Hope Company.

Fourteenth. It is mutually understood and agreed that the requirements of domestic consumers of the Ohio Company shall be fully supplied from the gas delivered hereunder in preference to manufacturers purchasing gas for manufacturing purposes, and that the Hope Company can be required to supply gas to be used for manufacturing purposes only where the same is sold under special contracts which have first been submitted to and approved in writing by the Hope Company and which expressly provide that natural gas will be supplied thereunder only in so far as the same is not necessary to meet the requirements of [fol. 66] domestic consumers supplied through pipe lines of the Ohio Company.

Fifteenth. The Ohio Company undertakes and agrees that it will pay to the Hope Company for natural gas sold and delivered to it by the Hope Company hereunder as follows:

(a) For all natural gas sold and delivered to the Ohio Company to enable it to meet the requirements of its domestic consumers and the domestic consumers of companies which it supplies with gas, fifty per cent. of the amounts payable by such consumers therefor, provided, however, that the minimum amount to be received by the Hope Company for each One Thousand cubic feet of natural gas supplied by it for domestic consumers shall not be less than as follows, to-wit:

From March 1st, 1910, to May 31st, 1918, inclusive, 15 cents;

From June 1st, 1918, to May 31st, 1920, inclusive, 17½ cents;

From and after June 1st, 1920, for each successive period of five years, a price not less than 110 per cent. of the highest price received by the Hope Company in the last preceding period of 5 years.

(b) For all natural gas sold and delivered to the Ohio Company to enable the Ohio Company, or companies which it supplies with gas, to fulfill conntracts made with the consent of the Hope Company for the sale of gas for manufacturing purposes, sixty per cent. of the amounts payable therefor by the manufacturers or other consumers by whom the same is purchased.

Sixteenth. It is mutually understood and agreed that whenever the Ohio Company, in addition to the gas purchased by it from the Hope Company, is obtaining gas from other sources (under the right as provided in the Thirteenth [fol. 67] Paragraph hereof), nevertheless, for the purpose of computing the amounts to be paid to the Hope Company hereunder, all gas sold by the Ohio Company for domestic consumers, shall, up to the full amount of gas supplied by the Hope Company, be deemed to be gas obtained from the Hope Company.

In all cases where gas is obtained from other sources and is commingled with gas obtained from the Hope Company prior to delivery to consumers, it is necessary that the gas obtained from the Hope Company, as well as the gas from other sources, shall be measured before such commingling takes place; it is agreed, therefore, that such measurement of the gas obtained from the Hope Company at such time shall be by Pitot tubes or other accurate devices of standard registering type as may be agreed upon, to be installed and maintained at the expense of the Hope Company as nearly as possible at the junction of the lines of the Hope Company with the lines of the Ohio Company, but on the West Virginia side of the Ohio River. The gas obtained from other sources shall be measured at the expense of the Ohio Company before the commingling takes place, in a manner satisfactory to the Hope Company; and the Ohio Company shall give the Hope Company 24 hours notice specifying the exact time when such gas will be turned into the lines of the Ohio Company.

The proportion of gas delivered to consumers that has been obtained from each source shall be determined as follows, viz:

(a) The Ohio Company shall ascertain the amount of gas obtained in each month from all sources and measured before commingling; the percentage by which such total exceeds the amount of gas payable for by all consumers as [fol. 68] measured by the regular reading of meters in the same month shall be used for the purposes of this contract as the "percentage of loss" for such month.

(b) If the amount of gas furnished by the Hope Company during any month as measured at the State Line, less the percentage of loss, exactly equals or exceeds the amount of gas payable for by domestic consumers to the Ohio Company for such month, then all gas payable for by such domestic consumers in such month shall be deemed to have been gas delivered by the Hope Company for domestic consumers at the rate stipulated in clause "a" of the fifteenth paragraph hereof; but if the amount of gas furnished by the Hope Company during any month as measured at the State Line, less the percentage of loss, is less than the amount of gas payable for by domestic consumers in such month, then the Hope Company shall be paid for all gas delivered in such month as measured at the State Line, less the percentage of loss, at the average rate payable by domestic consumers to the Ohio Company for such month.

(c) If the amount of gas furnished by the Hope Company during any month as measured at the State Line, less the percentage of loss, exceeds the amount of gas payable for to the Ohio Company in such month by domestic consumers, then such excess amount shall be the amount of gas furnished by the Hope Company for manufacturing purposes and shall be paid for at the rate stipulated for in clause "b" of the fifteenth paragraph hereof.

(d) If the amount of gas furnished from all sources in any month, as measured before commingling, is less than the amount of gas payable for in such month by all consumers to the Ohio Company (which is a probable condition in spring months), then the amount of gas to be paid for to

the Hope Company by the Ohio Company for such month shall be determined as follows:

[fol. 69] The percentage which the amount of gas furnished by the Hope Company measured at the State Line bears to the total amount of gas furnished by all sources, measured before commingling, shall be ascertained, and such percentage of the total amount of gas payable for by all consumers to the Ohio Company in such month shall then be computed; if the resulting computation is equal to or larger than the amount of gas payable for to the Ohio Company by domestic consumers for such month, then all gas payable for by domestic consumers to the Ohio Company for such month shall be deemed to be the gas delivered by the Hope Company at the rate set forth in clause "a" of the fifteenth paragraph hereof; and the excess of such resulting computation over the amount payable for in such month to the Ohio Company by domestic consumers, shall be deemed to be gas delivered by the Hope Company for manufacturing purposes at the rate set forth in clause "b" of the fifteenth paragraph hereof; if, however, the said computation is less than the amount of gas payable for to the Ohio Company in such month by domestic consumers, then the Hope Company shall be paid for all of the gas contained in such computation at the average rate per thousand cubic feet paid to the Ohio Company by domestic consumers in such months.

Seventeenth. Where gas is measured by Pitot tubes, meters or other devices, such measuring instruments shall be of a standard registering type and the gas shall be measured on a basis of 10 ounces pressure to the square inch above 14.4 pounds atmospheric pressure, according to Boyle's law for the measurement of gas at varying pressures, without correction for temperature of barometric conditions. Each company shall have full access to the measuring stations at all times with the right to keep an employe or employes there for the purpose of checking the [fol. 70] gas measurements; where Pitot tubes are used they shall be read at 15 minute intervals throughout each day of 24 hours, and duplicate statements of the daily readings shall be mailed daily to each party; where meters are used such meters shall be read by the Ohio Company

daily, or as often as the meters require, but each party shall have constant access to the meters.

If either party challenges the accuracy of any meter or other device in use under the sixteenth paragraph of this contract, and desires to have the meter or such device tested or repaired, the Ohio Company shall test and repair the same in the presence and to the satisfaction of the Hope Company, or a representative, if the Hope Company wishes to exercise the right to be present or to be represented at such test. Before taking out such meter or device for test or repairs, a correctly registering meter or other agreed device shall be set in its place, and adjustment and settlement for the inaccurate measurements by the defective meter shall be made at the regular monthly periods on the basis of the amount of gas registered at like pressures for like periods of time when the meter was registering accurately.

Eighteenth. The Ohio Company undertakes and agrees that on or before the 25th day of each month it will furnish to the Hope Company a detailed statement of the amount of gas charged to its domestic consumers during the preceding month, showing separately the amount so supplied in each city and town supplied by it either directly or through distributing companies; and the rates at which gas is sold in each of said cities and towns; the number of domestic consumers in each of said cities and towns; the amounts charged during the preceding month to each con- [fol. 71] sumer using gas for manufacturing purposes; whether any gas has been obtained from other sources; and if so the amount of gas obtained from the Hope Company and the amount of gas obtained from other sources determined as hereinbefore provided; and all such other data as the Hope Company may reasonably require or as may be necessary to enable the Hope Company to determine the amount which it is entitled to receive for gas supplied by the Hope Company to the Ohio Company and charge to consumers during the preceding month. The Ohio Company undertakes and agrees that it will pay in semi-monthly installments the amount due to the Hope Company for all gas delivered by the Hope Company to the Ohio Company during the preceding month; the first installment shall be paid on or before the 15th of the month and shall be 75

per cent. of the total amount due for the month, approximated as fairly as may be at the time by the Ohio Company; the second installment or balance shall be paid in full on the 27th day of the month; the Ohio Company also agrees that the amounts of gas charged to consumers during each month shall be true statements of the amounts actually delivered to consumers determined as is provided in Paragraph Ninth hereof.

Nineteenth. It is understood and agreed that the minimum price of fifteen cents per thousand cubic feet hereinabove provided for is based upon an assumed pressure not exceeding 8 ounces above atmospheric, and that in case of the delivery of gas to consumers at a pressure exceeding 8 ounces above atmospheric, the amount of gas to be charged to such consumers shall be increased proportionately to the increase in the density of the gas.

Twentieth. The Ohio Company covenants to use diligent effort to maintain and keep up its deliveries of natural gas under the spirit and intention of this agreement in order [fol. 72] that the natural gas which the Hope Company is prepared to deliver hereunder may find a continuous market.

Twenty-first. This contract shall be binding upon the parties hereto and their successors and assigns, respectively, provided, however, that in case the gas distributing system now or hereafter owned or controlled by the Ohio Company is broken up, so that parts thereof are vested in different owners, the Hope Company, at its option, shall have the right to terminate this contract.

In witness whereof the parties hereto have hereunto caused their corporate names to be signed by their respective Presidents or Vice Presidents and their respective seals to be hereunto affixed by their respective Secretaries the day and year first above written.

Hope Natural Gas Company, by John G. Pew, Vice-President. Attest: Christy Payne, Secretary. (Seal.) The East Ohio Gas Company, by M. B. Daly, President. Attest: H. V. Shulters, Secretary. (Seal.)

Supplemental Agreement—April 12, 1921

Agreement, made and entered into this 12th day of April, 1921, by and between Hope Natural Gas Company, a West Virginia corporation, party of the first part, and The East Ohio Gas Company, an Ohio corporation, party of the second part;

[fol. 73] Whereas, the party of the first part has represented to the party of the second part that owing to the depletion of the natural gas fields and increased cost of operations, it cannot produce and deliver natural gas to the party of the second part at the prices existing in the contract between the two companies dated the 1st day of March, 1910, and that it cannot expend the sums necessary to develop new fields and construct the pipe lines, compressor stations and other appliances to make the same available unless it receives an increase in rates; and

Whereas, upon investigation the party of the second part believes that the new prices proposed are just and reasonable and provide the only means by which any reasonable supply of gas can be obtained for the requirements of its consumers;

Now, therefore, this agreement witnesseth: That the parties hereto, for and in consideration of the premises and of the sum of one dollar each to the other in hand paid, the receipt of which is hereby acknowledged, have mutually covenanted and agreed and do hereby covenant and agree, that Paragraph Fifteenth of the said contract dated March 1, 1910, between the companies parties hereto, be and it is hereby modified to read as follows:

"Fifteenth. The Ohio Company undertakes and agrees that it will pay to the Hope Company for natural gas sold and delivered to it by the Hope Company, sixty (60) per cent. of the amounts payable by the consumers of the Ohio Company therefor, provided however, that for the year beginning May 1, 1921, the minimum average amount to be received by the Hope Company for each one thousand cubic feet of natural gas shall not be less than thirty (30) cents; for the year beginning May 1, 1922, shall not be less than [fol. 74] thirty-two and one-half (32½) cents; and for the period beginning May 1, 1923, and ending May 31, 1924, shall not be less than thirty-five (35) cents. The price to

be received after said last named date to be then adjusted upon an equitable basis, having reference to the then existing condition of the producing fields, the available supply of gas and the cost of producing the same."

It is also agreed that Paragraph Fifteenth as it now appears in said contract shall be and hereby is cancelled and annulled, the contract to be and remain in all other respects and as herein modified, in full force and effect.

Witness the common and corporate names and seals of the parties hereto duly affixed and attested by their proper officers the day and year first above written.

Hope Natural Gas Company. T. O. Sullivan, Vice-President. Attest: S. E. W. Burnside, Secretary. (Seal Hope N. G. Co.) The East Ohio Gas Company. M. B. Daly, President. Attest: C. W. Downing, Secretary. (Seal E. O. G. Co.)

Supplemental Agreement—April 30, 1924

Agreement made and entered into this 30th day of April, 1924, but to become effective as of June 1, 1924, by and between Hope Natural Gas Company, a West Virginia Corporation, Party of the First Part and The East Ohio Gas Company, an Ohio corporation, Party of the Second Part.

Whereas, under date of April 12, 1921, the parties hereto entered into a contract modifying paragraph Fifteenth of [fol. 75] a certain contract between the parties, bearing date March 1, 1910, and fixing the price at which the Hope Company should furnish natural gas to the East Ohio Company for the period ending May 31, 1924, and providing further that prices for natural gas after May 31, 1924 should be adjusted upon an equitable basis, having reference to the then existing condition of the producing fields, the available supply of gas and the cost of producing the same; and

Whereas, upon investigation the parties believe that the prices hereinafter named are upon an equitable basis, having referenec to the elements so referred to;

Now, therefore, this agreement witnesseth:

That the parties hereto, for and in consideration of the premises and of the sum of One Dollar ($1.00) each to the

other in hand paid, the receipt of which is hereby acknowledged, have mutually covenanted and agreed and do hereby covenant and agree:

First. That said paragraph Fifteenth of said contract of March 1, 1910, as modified by said agreement of April 12, 1921, be and it is hereby further modified to read as follows:

"Fifteenth. The Ohio Company undertakes and agrees that it will pay to the Hope Company for natural gas sold and delivered to it by the Hope Company for the year beginning June 1, 1924 and ending May 31, 1925, the sum of thirty-five cents (35c) per thousand cubic feet; for the year beginning June 1, 1925, and ending May 31, 1926, the sum of thirty-seven and a half cents (37½c) per thousand cubic feet; for the year beginning June 1, 1926 and ending May 31, 1927, the sum of forty cents (40c) per thousand cubic feet, and for the year beginning June 1, 1927 and ending May 31, 1928, the sum of forty cents (40c) per thousand cubic feet.

[fol. 76] The price to be received after said last named date to be then adjusted upon a like equitable basis, having reference to the then existing condition of the producing fields, available supply of gas and cost of producing same."

Second. That paragraph Sixteenth of said contract of March 1, 1910 be modified to read as follows:

"Sixteenth. It is understood that the Ohio Company, in addition to the gas purchased by it from the Hope Company, itself produces large quantities of gas and also purchases large quantities from others than the Hope Company, all of which gas is commingled for delivery to consumers on the Ohio Company's lines, and that the quantity of gas actually delivered by the Ohio Company to the consumers by reason of leakage and otherwise is normally less than the aggregate quantity of gas delivered into its lines from all sources.

It is agreed, in order to determine the quantity for which the Hope Company shall ultimately be paid, that the gas obtained from the Hope Company shall be measured before such commingling takes place, by Pitot tubes or other accurate devices of standard registered type as may be agreed

upon, to be installed and maintained at the expense of the Hope Company as nearly as possible at the junction of the lines of the Hope Company with the lines of the Ohio Company but on the West Virginia side of the Ohio River.

The gas produced by the Ohio Company and that purchased from other sources than the Hope Company shall be measured at the expense of the Ohio Company before such commingling takes place in a manner satisfactory to the Hope Company.

Provisional payments shall be made to the Hope Company from month to month in the same manner as at present, that is to say, the amount of gas produced and purchased by the Ohio Company, from others than the Hope Company, as measured before commingling, shall be deducted [fol. 77] from the amount of gas actually sold and delivered by the Ohio Company to its customers during the month, and the Hope Company be paid for the balance.

At the end of each year a final adjustment for the year shall be made so that the Hope Company shall ultimately receive pay for such percentage or proportion of the gas actually delivered during the year by The East Ohio Gas Company to its consumers as the measurements of gas delivered by Hope Company, taken before commingling, bear to the aggregate measurements of gas produced and purchased by the Ohio Company from all sources before such commingling, and final settlement for the year be made upon that basis. The year shall be taken as ending on May 31st, and final settlement for the year shall be made within thirty days thereafter."

It is further agreed that except as to said paragraphs Fifteenth and Sixteenth as now modified said contract of March 1, 1910 shall be and remain in full force and effect.

Witness the corporate names and seals of the parties hereto, duly affixed and attested by their proper officers, the day and year first above written.

Hope Natural Gas Company, by T. O. Sullivan, Vice-President. Attest: S. E. W. Burnside, Secretary.
The East Ohio Gas Company, by M. B. Daly, President. Attest: R. W. Brink, Secretary.

[fol. 78] Hope Natural Gas Company, William Penn Way, Pittsburgh, Pa.

John B. Corrin, Vice-President & Genl. Mgr.

May 26, 1928.

Mr. R. W. Gallagher, President the East Ohio Gas Company, Cleveland, Ohio.

Dear Mr. Gallagher: In view of the extended negotiations The East Ohio Gas Company is obliged to carry on with the City of Cleveland for a proposed new contract covering distribution of gas to consumers within the City, and which we appreciate makes it difficult for The East Ohio Gas Company to enter into a new contract with the Hope Natural Gas Company for the supply of gas by the Hope Company following the termination of the present agreement on May 31st, 1928, the Hope Natural Gas Company is willing to extend, and does hereby extend, for a period of three months from May 31st, 1928, the agreement dated April 30th, 1924 between the two companies which is a modification of the original agreement of March 1st, 1910, all terms and conditions of the present agreement to rule during the three months' extension hereby granted.

Yours very truly, Hope Natural Gas Company, by (Signed) John B. Corrin, Vice-President.

[fol. 79] Supplemental Agreement—September 1, 1928

Agreement made and entered into as of September 1, 1928, by and between "Hope Natural Gas Company," a West Virginia corporation, of the first part, and "The East Ohio Gas Company," an Ohio corporation, of the second part:

Whereas, under date of March 1, 1910, the parties hereto entered into a contract for the purchase and sale of natural gas, which contract has been modified and extended at various dates, the last modification and extension having expired on August 31, 1928; and

Whereas, it is necessary to agree upon the price for natural gas delivered after August 31, 1928; and

Whereas, The East Ohio Gas Company is not now in a position to determine its requirements for any definite

period, due to failure to secure a renewal of its contract with the City of Cleveland,

Now, therefore, this agreement witnesseth: That the parties hereto, for and in consideration of the premises and of the mutual promises contained in said agreement of March 1, 1910 and herein, have mutually covenanted and agreed, and do hereby covenant and agree that Paragraph Fifteenth of said contract of March 1, 1910, as modified by later agreements, be and it is hereby further modified to read as follows:

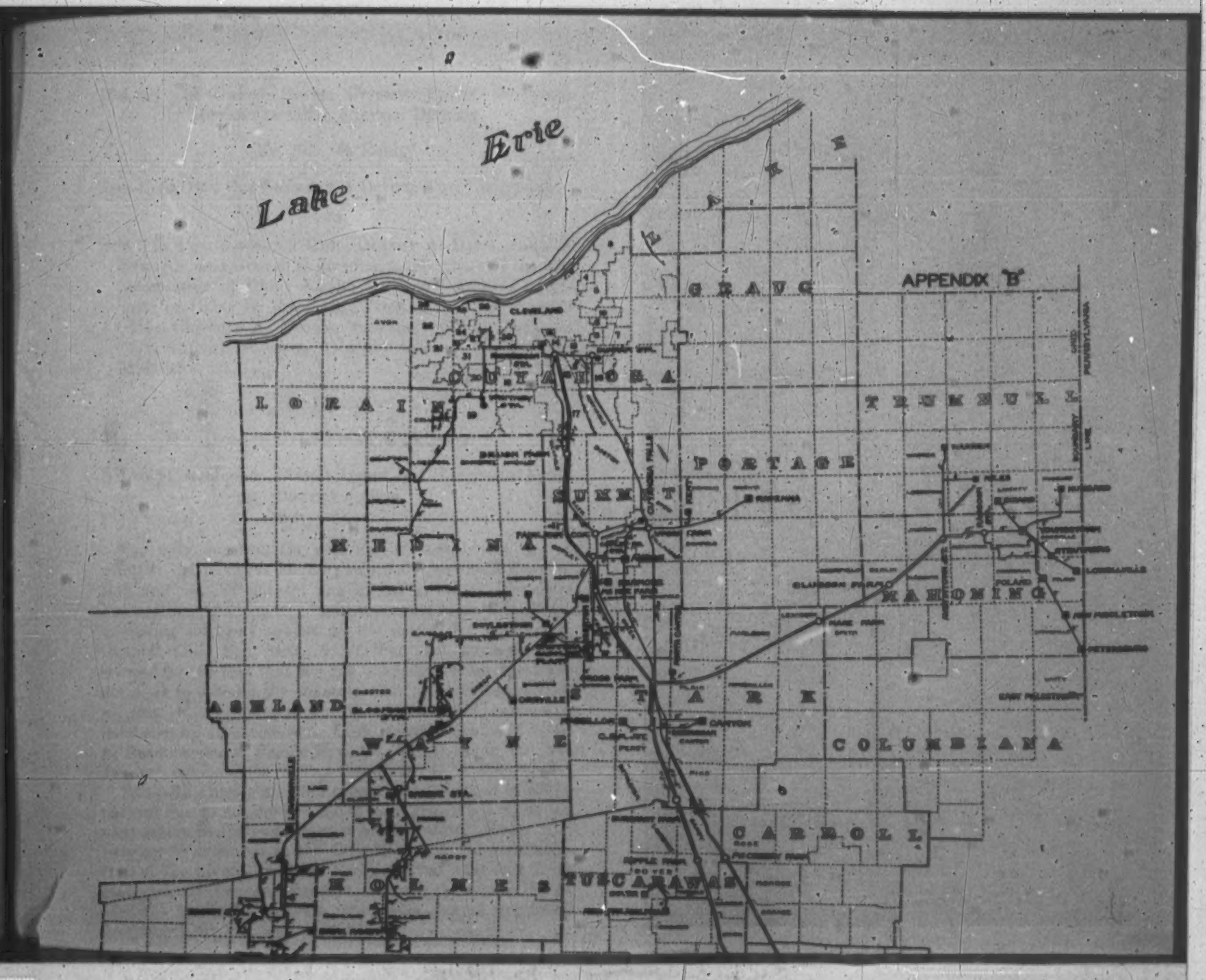
"Fifteenth. The Ohio Company undertakes and agrees that it will pay to the Hope Company for natural gas sold and delivered to it by the Hope Company on and after September 1, 1928, the sum of forty-one and eight tenths cents (41.8c) per thousand cubic feet, this price agreement to terminate at the end of any calendar month upon service of a written notice by either party upon the other at least thirty (30) days prior thereto. Upon such termination the [fol. 80] price to be received thereafter shall then be adjusted upon a like equitable basis, having reference to the then existing condition of the producing fields, the available supply of gas and the cost of producing same."

It is further agreed that except as to said Paragraph Fifteenth as now modified, said contract of March 1, 1910, with the present effective modifications thereof, shall be and remain in full force and effect.

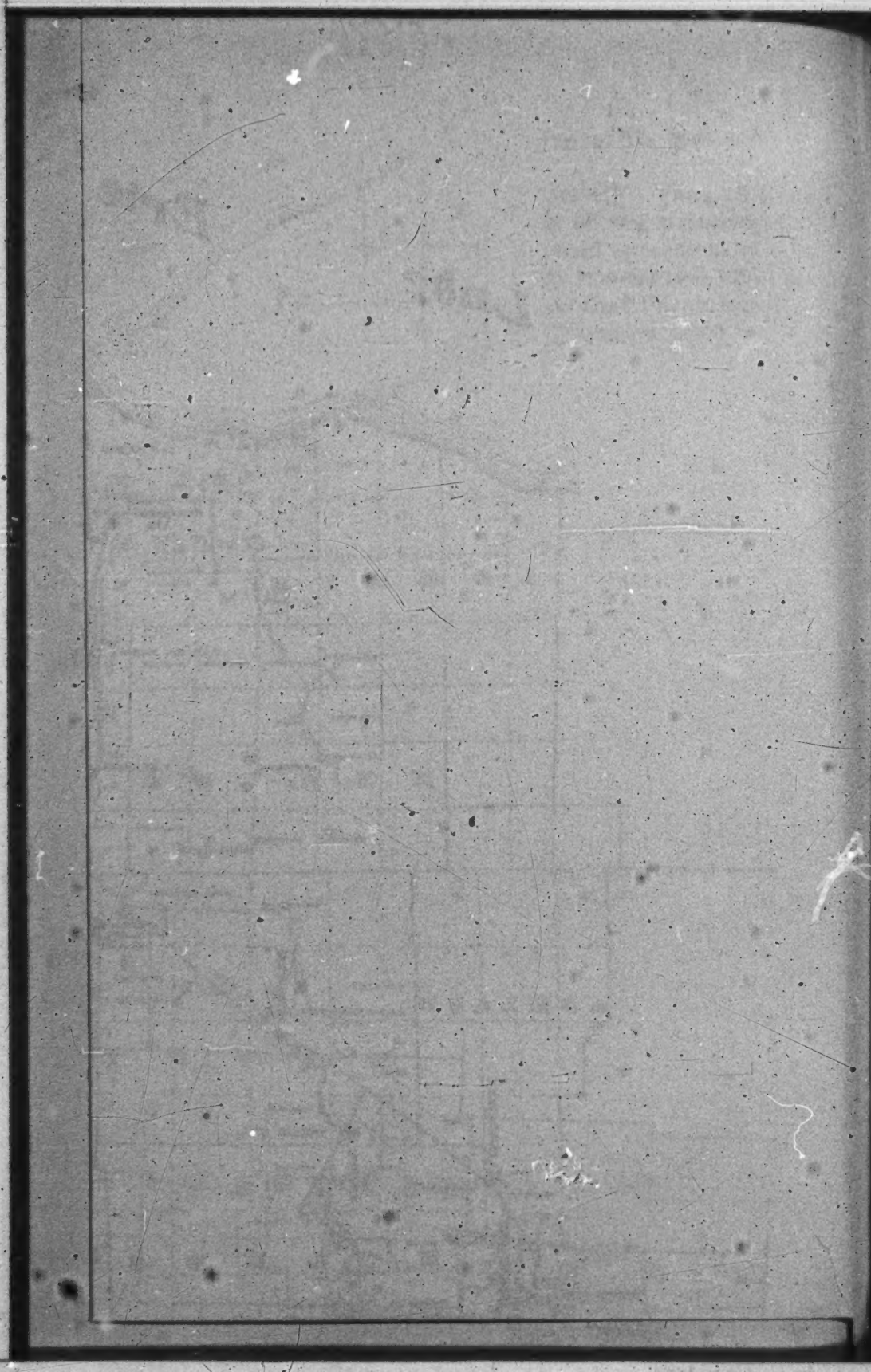
Witness the corporate names and seals of the parties hereto, duly affixed and attested by their proper officers as of the day and year first above written.

Hope Natural Gas Company, by Jno. B. Corrin, Vice-President. Attest: S. E. W. Burnside, Secretary. The East Ohio Gas Company, by R. W. Gallagher, President. Attest: R. W. Brink, Secretary.

(Here follows map, side folio 81.)


Lake Erie
APPENDIX "B"
GRANGE
CUYAHOGA
LORAIN
TRUMBULL
PORTAGE
SUMMIT
MEDINA
MAHONING
STARK
ASHLAND
WAYNE
COLUMBIANA
CARROLL
HOLMES
TUSCARAWAS

KNOX
COSHOCTON
HARRISON
GUERNSEY
BELMONT
MONROE
WEST VIRGINIA
Ohio River
81



[fol. 82] In United States District Court, Southern District of Ohio, Eastern Division

No. 792. In Equity

The East Ohio Gas Company, a Corporation, Complainant,

vs.

The Tax Commission of Ohio, Quincy A. Davis, John S. Edwards, and George C. Braden, as Members of the Tax Commission of Ohio; Joseph T. Tracy, Auditor of the State of Ohio; H. Ross Ake, Treasurer of the State of Ohio; Clarence J. Brown, Secretary of the State of Ohio; Gilbert Bettman, Attorney General of Ohio, Defendants

At Columbus

Opinion Upon Final Submission

Before Hickenlooper, Circuit Judge, and Hough and Nevin, District Judges

Per Curiam:

The only question for decision in the present case is whether the business of the petitioner, the retail distribution and sale of natural gas in the cities of Cleveland, Youngstown, Akron, etc., is to be regarded as a local and intrastate business subject to the excise tax imposed by General Code Sec. 5483, or whether such business is so colored by the fact that the gas is brought from West Virginia, as to take on the characteristics of, and be classified as, interstate commerce, which, it is conceded, can not be burdened by an excise tax. U. S. Constitution, Art. 1, sec. 8; Rosenberger v. Pacific Exp. Co., 241 U. S. 48, 50; New Jersey Telephone Co. v. Tax Board, 280 U. S. 338, 346.

The petitioner is an Ohio corporation engaged in selling natural gas to consumers under local franchises from municipalities in the eastern part of that state. Some of its product is produced in the Ohio field, but, for determination of the pivotal question here involved, that fact is immaterial. It is conceded that, as regards the sale of the gas [fol. 83] produced in Ohio, the excise tax is applicable.

Most of the gas sold by petitioner is purchased from The Hope Natural Gas Company, a corporation under the laws of West Virginia with producing fields located in that state, and is delivered to petitioner by pipe line at the state boundary. It is with the sale of this gas only that we are concerned. It should also be observed that The Hope Natural Gas Company is not taxed by virtue of its sales to petitioner; nor is any excise tax attempted to be laid upon the right to transport such gas from the point of delivery at the state boundary to the point of delivery at the state boundary to the point of consumption. The excise tax is computed solely upon gross receipts from sales to local consumers.

It must be conceded that, in as much as transportation of whatever goods, from a point of origin in one state to a point of consumption in another state, is interstate commerce, so here the transportation of gas by pipe-line from West Virginia to Cleveland is interstate commerce. Such commerce retains its interstate character throughout the entire journey—or for so long as the journey itself is not broken, even though that be to the very burner of the consumer. Pennsylvania Gas Co. v. Public Service Comm., 252 U. S. 23; Illinois Cent. R. R. v. Louisiana Comm., 236 U. S. 157, 163. The fact that title to the gas passes at the state border is also of no material significance. Peoples Natural Gas Co. v. Public Service Comm., 270 U. S. 550, 554. Upon these hypotheses it is contended by the petitioner that the proceeds of the sale of the West Virginia gas at the end of its interstate journey, must of necessity be receipts arising from interstate commerce, and that the tax cannot be sustained since it is either "a tax upon appellant's" (Petitioner's) "gross receipts from interstate and foreign commerce or a license fee to be computed thereon." New Jersey Telephone Co. v. Tax Board, supra; Pullman Co. v. Richardson, 261 U. S. 330, 338. This we think to be a non sequitur in the present case.

The petitioner is a public service corporation, exercising [fol. 84] rights of eminent domain and occupancy of the public streets. It exercises its franchises only through grant from the state, even though control of such franchise grants is delegated to the municipalities. The tax purports to be, and is, we think, an excise tax; that is, "an impost for a license to pursue certain callings, or to deal in

special commodities, or to exercise particular franchises." Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 227; compare, Flint v. Stone Tracy Co., 220 U. S. 108, 151. It is neither a property tax nor an attempt at license and regulation under the police powers of the state. But even such an excise tax may not be laid upon the right to engage in interstate commerce, nor measured by the proceeds of sales in such commerce. Galveston, etc. Ry. Co. v. Texas, 210 U. S. 217. It may, however, be levied upon the right to engage in a purely intrastate public utility business, and when so levied the amount of the tax may be measured by the gross receipts from such business. Thus we inevitably return to a determination whether the particular business, the gross receipts from which form the measure of the tax, is truly and essentially a local and intrastate business, separate and distinct from the elements of interstate commerce collaterally associated with it, for "it is the" (interstate) "commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it," not local or intrastate commerce. Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 83. And if the tax be levied upon the right to engage in an essentially local and intrastate public utility business, "it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable." Flint v. Stone Tracy Co., supra, at page 165. So here, if the business subject to the excise be essentially local, it is no objection that the tax is measured by income made possible only through the prior transportation of gas in interstate commerce, which commerce may not itself be thus burdened.

So simplified and considered, we are constrained to the opinion that the petitioner's business, which was subjected [fol. 85] to the excise tax, was a local or intrastate business which might properly thus be taxed. Public Utilities Comm. v. Landon, 249 U. S. 236; Missouri v. Kansas Natural Gas Co., 265 U. S. 298. Not only does the language employed by the Supreme Court in these two cases aptly and comprehensively cover the present issue, but all other indicia of the true character of the business point in the same direction. Thus bulk must be considered as broken when the gas passed from the great gas transporta-

tion lines into the network of smaller distributing lines, in analogy to the original package doctrine; the interstate journey must be considered as ended when the gas is placed in proper containers, be these tanks or low pressure distribution system, for delivery to local trade, in analogy to the storage cases (Atlantic Coast Line v. Standard Oil Co., 275 U. S. 257, 269); the gas must be considered processed and modified in an essential characteristic when its pressure is so reduced as to make it available for consumers' use, if analogy to the processing of goods, as breaking the interstate journey, be drawn; and, so far as the relationship between the company and consumers is concerned, it makes no difference whatever to the latter whence comes the gas. The trade was essentially local. The transportation of the gas from West Virginia was but a preparation for it. Wagner v. City of Covington, 251 U. S. 95, 103.

We are not here and now concerned with various questions suggested during oral argument, such as: whether the petitioner's position would be in anywise different had it produced the gas on its own properties in West Virginia, instead of purchasing it; whether any excise tax could be laid directly upon the business of transporting it through the state; the nature and permissible extent of regulation under the police power of the state; or the effect of accepting the total of consumers' meter readings as indicating the gross amount sold to petitioner. These matters all become immaterial when we arrive at the decision of the independence and local character of the business, the gross receipts from which serve as a measure of the tax. The intrastate nature of this business is further emphasized, [fol. 86] also, when we consider that no part of the receipts which serve as such measure is paid from without the state, and no deliveries of gas, with which we are here concerned, are made by the petitioner in another state.

Decree may be presented dismissing the bill for want of equity.

Smith Hickenlooper, United States Circuit Judge.
Benson W. Hough, United States District Judge.
Robert R. Nevin, United States District Judge.

For Complainant: Tolles, Hogsett & Ginn, William B. Cockley.

For Defendants: Gilbert Bettman, Attorney General of the State of Ohio; Lewis F. Laylin and William J. Ford, Special Counsel.

[fol. 87] In United States District Court, Southern District of Ohio, Eastern Division

In Equity. No. 792

The East Ohio Gas Company, a Corporation, Complainant,

vs.

The Tax Commission of Ohio et al., Defendants

Decree—July 19, 1930

This cause came on to be heard at this term on the pleadings, evidence, consisting of an Agreed Statement of Facts, and arguments of counsel, before the Honorable Smith Hickenlooper, United States Circuit Judge, and the Honorable Robert R. Nevin and the Honorable Benson W. Hough, United States District Judges, constituted and sitting as a court in this cause under section 380 of Title 28 of the United States Code, formerly Section 266 of the United States Judicial Code; and thereupon, upon consideration thereof, the Court finding upon the issues joined for the defendants, it is ordered, adjudged and decreed as follows, viz:

That the Bill of Complaint herein be and the same hereby is dismissed.

It is further ordered, adjudged and decreed that the defendants have and recover from the complaint their costs herein expended, taxed at $—, for which execution is hereby awarded.

To which order, judgment and decree the complaint excepts.

Smith Hickenlooper, United States Circuit Judge.
Robert R. Nevin, United States District Judge.
Benson W. Hough, United States District Judge.

Approved as to form.
William B. Cockley, Solicitor for Complainant.

[fol. 88] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL

Considering itself aggrieved by the decision dated July 19, 1930, of the District Court of the United States for the Southern District of Ohio, Eastern Division, constituted and sitting in this cause pursuant to Section 380 of Title 28 of the United States Code (formerly Section 266 of the United States Judicial Code), the plaintiff herein, The East Ohio Gas Company, hereby prays that an appeal be allowed to the Supreme Court of the United States in this cause and for an order fixing the amount of bond thereon.

And the said The East Ohio Gas Company assigns the following errors in the record and proceedings in said cause:

1. Said District Court erred in holding that gross receipts of The East Ohio Gas Company from the sale of natural gas purchased by it from the Hope Natural Gas Company of West Virginia and the Peoples Natural Gas Company of Pennsylvania at the Ohio state boundary line, and transported, distributed and sold by The East Ohio Gas Company to consumers in municipalities in the northern and eastern parts of the State of Ohio, are receipts from intrastate business taxable as such by the excise tax statutes of the State of Ohio (Section 5483 of the Ohio General Code and related sections), and in holding that an order of the Tax Commission of Ohio, fixing such gross receipts as subject to such tax and levying a tax thereon, does not violate the commerce clause (Article I, Section 8) of the Constitution of the United States.

2. Said District Court erred in refusing to grant the injunction prayed for in the Bill of Complaint seeking to enjoin the enforcement of said order of the Tax Commission of Ohio by it and by other officers of the State of Ohio, and in dismissing the Bill of Complaint.

[fol. 89] For which errors the plaintiff, The East Ohio Gas Company, prays that said decree of said District Court

dated July 19, 1930, in the above entitled cause be reversed and a decree rendered in favor of said plaintiff and for costs.

T. H. Hogsett, W. B. Cockley, Counsel for Appellant.

[fols. 90-94] In United States District Court

[Title omitted]

Order Allowing Appeal

The appellant in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from a decree made and entered in the above entitled suit on the 19th day of July, 1930, by the District Court of the United States for the Southern District of Ohio, Eastern Division, constituted and sitting pursuant to Section 380 of Title 28 of the United States Code (formerly Section 266 of the United States Judicial Code), and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors and prayer for reversal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from said District Court of the United States, Southern District of Ohio, Eastern Division, in this cause, as provided by law, and it is further ordered that the Clerk of said District Court shall prepare and certify a transcript of the record, proceedings, and decree in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within thirty (30) days from this date.

And it is further ordered that security for costs on appeal be fixed in the sum of Five Hundred and no/100 Dollars ($500.00).

Benson W. Hough, United States District Judge.

[fol. 95] IN UNITED STATES DISTRICT COURT

[Title omitted]

DOCKET ENTRIES

April	2, 1930.	Bill of Complaint filed.
"	" "	Motion filed.
"	" "	Order hearing on Int. Injunction set for 6/7/30.
"	" "	Notice filed.
"	" "	Acknowledgment filed.
"	22, "	Subpoena in Chancery issued.
May	14, "	" " " " returned executed.
"	19, "	Entry leave to answer.
"	26, "	Answer filed.
June	24, "	Opinion filed.
July	19, "	Decree for Defendants. Bill dismissed.
Aug.	18, "	Petition for Appeal & Assgt. of Errors filed.
"	" "	Order allowing appeal.
"	" "	Appeal bond filed.
"	" "	Citation issued.
"	" "	Stipulation as to contents of record filed.
"	30, "	Stipulation as to certification of record filed.

[fol. 96] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated by and between counsel of record herein that the transcript of record to be certified by the Clerk of this Court on appeal to the Supreme Court of the United States shall contain the following:

1. Bill of Complaint.

2. Motion for a restraining order and application for a hearing on temporary injunction under Judicial Code Section 266.

3. Notice of application for a temporary injunction and acknowledgment of service.

4. Order of the District Court setting the hearing on the interlocutory injunction for June 7, 1930.

5. Answer of the defendants.

6. Narrative form of testimony including Agreed Statement of Facts, Exhibit A.

7. Opinion of District Court.

8. Decree.

9. Petition for appeal, assignment of errors and prayer for reversal.

10. Order allowing appeal.

11. Copy of bond.

[fol. 97] 12. Original citation and return of service.

13. Docket entries of District Court.

14. Copy of stipulation as to contents of record to be certified.

William B. Cockley, Attorney for Complainant.
Gilbert Bettman, L. F. Laylin, & W. J. Ford, Attorneys for Defendants.

[fol. 98] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 99 & 100] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION OF PARTS OF RECORD TO BE PRINTED—Filed Sept. 13, 1930

Comes now the Appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

Point 1. That the District Court of the United States for the Southern District of Ohio, Eastern Division, erred in holding that gross receipts of The East Ohio Gas Company from the sale of natural gas purchased by it from the Hope Natural Gas Company of West Virginia and the Peoples Natural Gas Company of Pennsylvania at the Ohio state boundary line, and transported, distributed and sold by

The East Ohio Gas Company to consumers in municipalities in the northern and eastern parts of the State of Ohio, are receipts from intrastate business taxable as such by the excise tax statutes of the State of Ohio (Section 5483 of the Ohio General Code and related sections), and in holding that an order of the Tax Commission of Ohio, fixing such gross receipts as subject to such tax and levying a tax thereon, does not violate the commerce clause (Article I, Section 8) of the Constitution of the United States.

Point 2. That said District Court erred in refusing to grant the injunction prayed for in the Bill of Complaint seeking to enjoin the enforcement of said order of the Tax Commission of Ohio by it and other officers of the State of Ohio, and in dismissing the Bill of Complaint.

Respectfully submitted.

Thomas H. Hogsett, William B. Cockley, Counsel for the East Ohio Gas Company, Appellant.

[fol. 101] [File endorsement omitted.]

[fols. 102 & 103] STIPULATION AS TO PARTS OF THE RECORD TO BE PRINTED

To the Clerk:

It is hereby stipulated by and between counsel of record herein that only the following parts of the record as filed in this Court need be printed by the Clerk for the hearing of the case:

1. Bill of Complaint. (R. 2 to 23 incl.)
2. Notice of Application for a temporary injunction and acknowledgment of service. (R. 25 and 26.)
3. Order of District Court setting the hearing on the interlocutory injunction for June 7, 1930. (R. 27.)
4. Answer of the defendants. (R. 28 to 34 incl.)
5. Narrative Form of Testimony including Agreed Statement of Facts, Exhibit "A". (R. 35 to 81 incl.)
6. Opinion of District Court. (R. 82 to 86 incl.)
7. Decreed. (R. 87.)
8. Docket Entries. (R. 95.)

9. Petition for Appeal, assignment of errors, and prayer for reversal. (R. 88 and 89.)

10. Order allowing appeal. (R. 90.)

11. Clerk's Certificate. (R. 98.)

12. Stipulation as to contents of record to be certified to Supreme Court. (R. 96 and 97.)

Thomas H. Hogsett, William B. Cockley, Counsel for Appellant. Gilbert Bettman, Atty. Gen.; L. F. Laylin, and W. J. Ford, Counsel for Appellees.

[fol. 104] [File endorement omitted.]

Endorsed on cover: File No. 35,375. S. Ohio, D. C. U. S. Term No. 453. The East Ohio Gas Company, appellant, vs. The Tax Commission of Ohio et al. Filed September 13, 1930. File No. 35,375.

FILE COPY

FILED

SEP 18 193

CHARLES ELMORE CRO

CLE

In the Supreme Court of the United States

OCTOBER TERM, 1930.

No. 453

THE EAST OHIO GAS COMPANY,
Appellant,

vs.

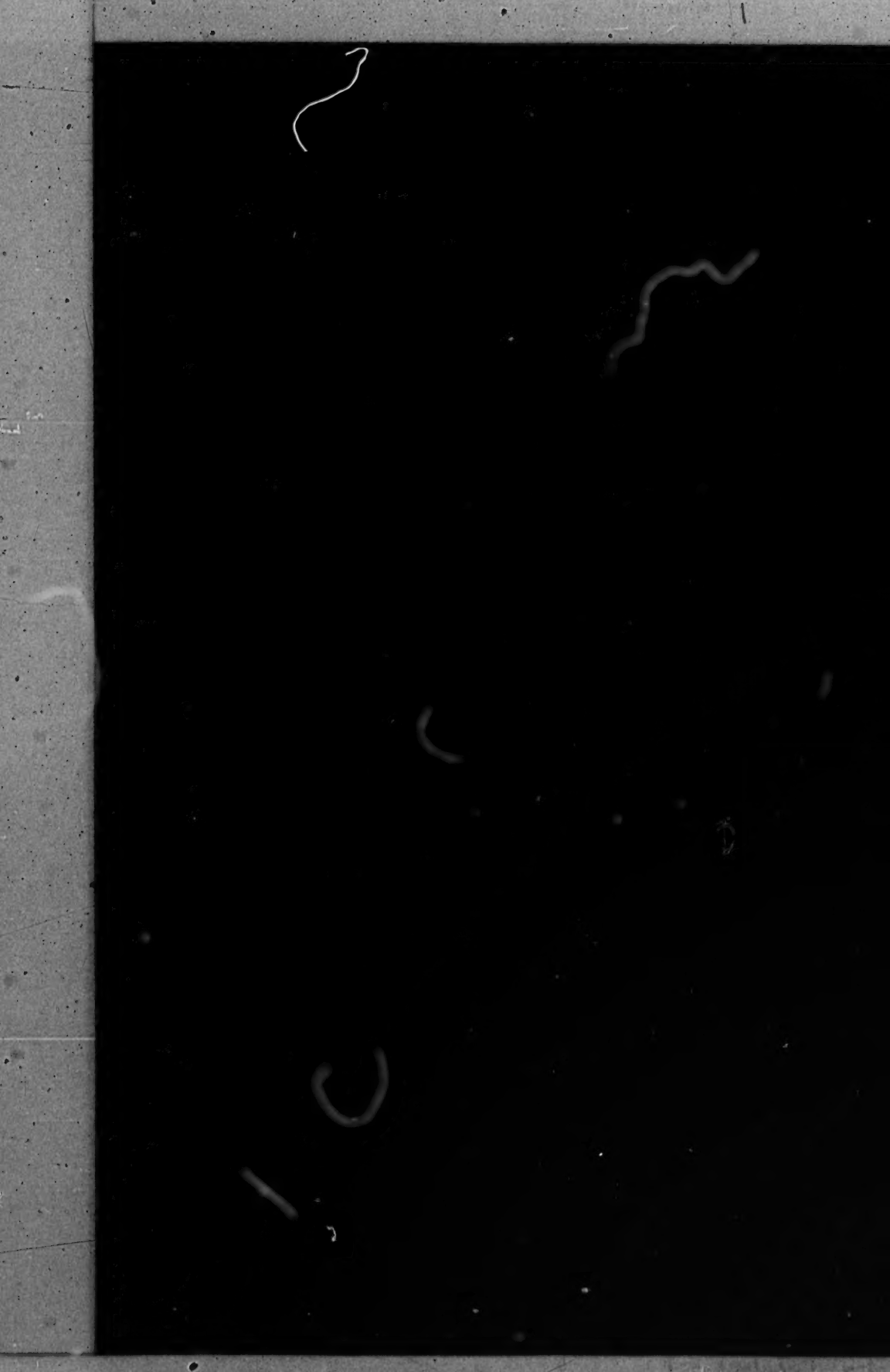
THE TAX COMMISSION OF OHIO, *et al.*,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

STATEMENT AS TO JURISDICTION ON APPEAL.

THOMAS H. HOGSETT,
WILLIAM B. COCKLEY,
Counsel for Appellant.

THE GOBIE LEGAL PUBLISHING CO., CLEVELAND, O.



In the Supreme Court of the United States

OCTOBER TERM, 1930.

No. .....

THE EAST OHIO GAS COMPANY,
Appellant,

vs.

THE TAX COMMISSION OF OHIO, *et al.*,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

STATEMENT AS TO JURISDICTION ON APPEAL.

THOMAS H. HOGSETT,
WILLIAM B. COCKLEY,
Counsel for Appellant.

INDEX.

A. Statutory Provisions Sustaining Jurisdiction 1

B. Date of Decree and Date of Application for Appeal 2

C. Nature of Case and Ruling Below 2

D. Cases Believed to Sustain Jurisdiction 4

Cases Cited.

Ex Parte Public Bank, 278 U. S. 101, 104 4

Herkness v. Irion, 278 U. S. 92, 93 4

Ohio Tax Cases, 232 U. S. 576, 587 4

Oklahoma Natural Gas v. Russell, 261 U. S. 290, 292 .. 4

Statutes.

Act of February 13, 1925, Chapter 229, Section 1, 43 Stats. 936-938 ..... 1, 4

Sections 238 and 266 of the Judicial Code 1, 4

United States Code, Title 28, Section 345 ..... 1, 4

In the Supreme Court of the United States

OCTOBER TERM, 1930.

No. .....

THE EAST OHIO GAS COMPANY,
Appellant,

vs.

THE TAX COMMISSION OF OHIO, *et al.*,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

STATEMENT AS TO JURISDICTION ON APPEAL.

May It Please the Court:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stats. 936-938, provides that Section 238 of the Judicial Code (United States Code, Title 28, Section 345) is amended to read as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

(3) An Act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a State or of an order made by an administrative board or commission created by and acting under the statute of a State, approved March 4, 1913, which Act is hereby amended by adding at the end thereof, 'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit'."

B.

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL.

The Decree sought to be reviewed was entered on the 19th day of July, 1930 (R. 95).* The application for appeal was presented on the 18th day of August, 1930 (R. 95).*

C.

NATURE OF CASE AND RULING BELOW.

The East Ohio Gas Company distributes natural gas in more than fifty municipalities in Northern and Eastern Ohio, the principal cities being Cleveland, Akron, Canton, Massillon and Youngstown. Approximately three-fourths of its supply of natural gas during the years 1927, 1928 and 1929 was produced in West Virginia and Pennsylvania. The West Virginia gas was purchased from Hope Natural Gas Company and the Pennsylvania gas from The Peoples Natural Gas Company, and both the West Virginia gas and Pennsylvania gas were sold and delivered by said Com-

* All references to the Record are to the pages of the certified unprinted record prepared by the Clerk of the District Court of the United States for the Southern District of Ohio, Eastern Division, and on file with the Clerk of this Court. The Record has not yet been printed.

panies to The East Ohio Gas Company at the Ohio state boundary line and there received into the high pressure transmission pipe lines of The East Ohio Gas Company. Through these high pressure lines the gas was transported to said municipalities where it entered the local distribution systems of The East Ohio Gas Company.

In making out its annual report to the Ohio Tax Commission for the years 1927, 1928 and 1929, The East Ohio Gas Company reported the receipts from the sales of all gas purchased by it from the Hope Natural Gas Company and the Peoples Natural Gas Company as the receipts from interstate commerce, and all other receipts as the receipts from intrastate commerce (R. 47-48)* and paid the Ohio excise tax of 1.35% on the amount reported as gross receipts from its intrastate business (R. 48-49).*

On January 13, 1930, the Ohio Tax Commission, an administrative body (charged by law) with the duty imposed by the Statutes of Ohio (General Code Secs. 5475, 5476, 5481, 5483 and 5488) of determining the gross receipts of natural gas companies for the purpose of taxation (R. 6),* made an order finding the receipts of The East Ohio Gas Company from the sale of West Virginia and Pennsylvania gas to be "omitted gross receipts" subject to the Ohio excise tax and directed the Attorney General to collect a tax based on these receipts (R. 47-50).* Demand for payment of this tax amounting, with penalties, to more than $900,000.00 was made by the Attorney General on January 16, 1930 (R. 51).* Application by The East Ohio Gas Company to the Tax Commission for a rehearing was made and denied (R. 51).*

Thereupon, the appellant filed its Bill of Complaint in the District Court seeking to enjoin the Tax Commission and other officers of the State of Ohio from enforcing said order of the Tax Commission on the ground that the order imposed a direct burden on interstate commerce in the form

of an excise tax upon the gross receipts thereof contrary to the provisions of Article I, Section 8, of the Constitution of the United States. Application was made for an interlocutory decree and a three Judge Court convened to hear said application (R. 24-27).*

At the time the hearing was held the case was finally submitted to the Court upon an Agreed Statement of Facts (R. 39).* The District Court refused to grant the injunction and dismissed the Bill of Complaint (R. 87).*

D.

CASES BELIEVED TO SUSTAIN JURISDICTION.

Federal jurisdiction is believed to be sustained by the following cases:

Oklahoma Natural Gas v. Russell, 261 U. S. 290, 292;
Herkness v. Irion, 278 U. S. 92, 93;
Ex Parte Public Bank, 278 U. S. 101, 104.

Equity jurisdiction rests upon the claim that the excise tax imposed by order of the Tax Commission of Ohio is a cloud upon the title to real estate owned by The East Ohio Gas Company and that the penalties and remedies provided by the Statutes of Ohio for the enforcement of the payment of this tax are such that the appellant will be irreparably injured in its business and property rights unless equity intervenes. *Ohio Tax Cases*, 232 U. S. 576, 587.

It is respectfully submitted that this Court has jurisdiction of this appeal by virtue of Sections 238 and 266 of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

THOMAS H. HOGSETT,

WILLIAM B. COCKLEY,

Counsel for The East Ohio Gas Company, Appellant.

FILE COPY

FILED
APR 2 1931
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1930

No. 453.

THE EAST OHIO GAS COMPANY,
Appellant,

vs.

THE TAX COMMISSION OF OHIO, *et al.*,
Appellee.

BRIEF OF APPELLANT.

WILLIAM B. COOKLEY,
THOMAS H. HOGSETT,
THOMAS M. HARMAN,
Attorneys for Appellant.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

In the Supreme Court of the United States

OCTOBER TERM 1930

No. 453.

THE EAST OHIO GAS COMPANY,
Appellant,

vs.

THE TAX COMMISSION OF OHIO, *et al.*,
Appellees.

BRIEF OF APPELLANT.

WILLIAM B. COCKLEY,
THOMAS H. HOGSETT,
THOMAS M. HARMAN,
Attorneys for Appellant.

INDEX.

	Page
Opinion Below	1
Nature and History of Case	1
The Issue	2
The Facts	2
Specification of Errors Relied Upon	7
Summary of Argument	8
Argument	9
I. The issue is narrowed to this: Does the admittedly interstate movement of natural gas imported into Ohio by East Ohio end before its delivery to East Ohio's consumers?	9
(a) The Ohio excise tax is for the privilege of doing an intrastate business and is measured solely by the receipts of that business	9
Ohio Statutes	9
History of Ohio Excise Tax	11
(b) A state excise tax on gross receipts from interstate commerce is invalid	14
(c) Delivery at state line does not change interstate character of movement	16
II. The interstate movement in this case continues to consumers' appliances	18
(a) *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, is controlling	18
(b) Supporting decisions of this Court	20
(c) Application to facts in this case	22
(d) Comments on decision below	24

Authorities Cited.

Binderup v. Pathe Exchange, Inc., 263 U. S. 291, 309 .. 21

Bowman v. Continental Oil Co., 256 U. S. 642 29

City of Sault Ste. Marie v. International Transit Company, 234 U. S. 333 15

Galveston etc. Railway Co. v. Texas, 210 U. S. 217 ..... 12, 14

Illinois etc. Railroad Company v. Railroad Commission, 236 U. S. 157, at page 163 ..... 9, 21

Lemke v. Farmers Grain Co., 258 U. S. 50 28

Missouri v. Kansas Gas Co., 265 U. S. 298 20

New Jersey Bell Telephone Co. v. State Board of Taxes and Assessments of New Jersey, 280 U. S. 338 14

Ohio Tax Cases, 232 U. S. 576 ..... 13, 14

Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23 ..... 8, 16, 19, 20, 21

In Re Pennsylvania Gas Company, 225 N. Y. 397, 122 N. E. 260 ..... 15, 25

People Ex Rel. Pennsylvania Gas Company v. Saxe, 229 N. Y. 446, 128 N. E. 673 16

Peoples Gas Co. v. Public Service Commission, 270 U. S. 550 ..... 16, 17

Port Richmond Ferry v. Hudson County, 234 U. S. 317 15

Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U. S. 83 17

Public Utilities Commission v. Landon, 249 U. S. 236 .. .. 18, 19, 20, 21

Shafer v. Farmers Grain Co., 268 U. S. 176 28

Southern Railway Co. v. Prescott, 240 U. S. 632, 639 .. 21

Western Union Telegraph Co. v. Foster, 247 U. S. 105, 113 ..... 9, 21

43 F. (2d) 170 1

92 Ohio Laws 79 11

95 Ohio Laws 139 12

96 Ohio Laws 124 12

In the Supreme Court of the United States

OCTOBER TERM 1930

No. 453.

THE EAST OHIO GAS COMPANY,
Appellant,

vs.

THE TAX COMMISSION OF OHIO, *et al.*,
Appellee.

BRIEF OF APPELLANT.

OPINION BELOW.

The opinion of the Statutory Court is printed in the record page 59 and reported in 43 F. (2d) 170.

NATURE AND HISTORY OF CASE.

Appeal under Judicial Code Section 238 from a final decree of a Statutory Court created pursuant to Judicial Code Section 266.

The bill filed by the appellant, The East Ohio Gas Company, hereinafter called "East Ohio," sought to enjoin The Tax Commission of Ohio and other state officers charged by the statutes of Ohio with the duty of fixing and collecting excise taxes from enforcing a certain order of the Tax Commission levying an excise tax on the gross receipts of East Ohio arising from the sale by it to consumers in Ohio of natural gas purchased from companies in West Virginia and Pennsylvania, deliveries being accepted by East Ohio at the Ohio state boundary line. The

bill alleged that these receipts were receipts from interstate commerce not subject to the Ohio excise tax, and that the order of the Tax Commission violated the Commerce Clause of the Federal Constitution. (R. 8.)

At the time set for hearing on the interlocutory decree the matter was submitted for final decision upon an agreed statement of facts. (R. 26.) The Statutory Court consisting of Hickenlooper, Circuit Judge, Hough and Nevin, District Judges, in a per curiam opinion held that East Ohio's gross receipts from the sale in Ohio of West Virginia and Pennsylvania gas were receipts from intrastate business subject to the Ohio excise tax. The Bill was dismissed. (R. 63.)

THE ISSUE.

The sole issue is whether the gross receipts of East Ohio from the local distribution in northern and eastern Ohio of natural gas purchased from companies in West Virginia and Pennsylvania, deliveries being accepted at the Ohio state boundary line, are receipts from interstate commerce.

THE FACTS.

East Ohio is an Ohio corporation engaged in the production and distribution of natural gas in more than fifty municipalities in the northern and eastern parts of the state. Cleveland, Akron, Canton, Massillon and Youngstown are the principal cities served. (R. 27.)

During the years in question approximately 25% of its supply was produced or purchased in Ohio. The balance was purchased approximately 72% from The Hope Natural Gas Company of West Virginia and 3% from The Peoples Natural Gas Company of Pennsylvania. (R. 27.) All three corporations are almost wholly owned subsidiaries of Standard Oil Company (New Jersey). (R. 28.)

By the Ohio statutes (printed in full, *infra*, pp. 10-11) each natural gas company is required to file an annual statement of its gross receipts prior to August 1st with The Ohio Tax Commission. This statement, on forms prepared by the Commission, sets forth the entire gross receipts of the company for business done within the state for the year next preceding May 1st, separated into receipts from intrastate business and receipts from interstate business. Each of these is again divided into receipts from sales to the Federal Government and receipts from sales to other persons. (R. 33.) The Tax Commission then determines the taxable gross receipts for the year excluding therefrom "all receipts derived wholly from interstate business or business done for the Federal Government." (G. C. Section 5455.) The taxable gross receipts are then certified by the Commission to the State Auditor who charges for collection "a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported by the Commission as the gross receipts of such company on its intrastate business for the year covered by its annual report to the Commission" by taking 1.35% of said gross receipts. (G. C. Section 5483.)

In each of the years 1927, 1928 and 1929 East Ohio filed with the Tax Commission the statement prescribed by statute on forms prepared by the Commission. Without troubling the Court with all the details of these statements East Ohio, in accordance with an opinion of the then Attorney General, reported all receipts from the sale in Ohio of West Virginia and Pennsylvania gas as receipts from interstate commerce. All other receipts were reported as receipts from intrastate commerce. (R. 33.)

In each of the three years the Tax Commission certified to the Auditor the amount shown in East Ohio's reports as receipts from intrastate business, the Auditor

computed the tax on that amount at the statutory rate and the Treasurer of State billed East Ohio and it paid the tax. (R. 33 and 34.)

On January 13, 1930, the Tax Commission made an order and finding that East Ohio had omitted certain gross receipts for the years 1927, 1928 and 1929 and accordingly it certified as additional or "omitted gross receipts" for those years the receipts from the sale in Ohio of the West Virginia and Pennsylvania gas. Subsequently, the Auditor of State computed the tax on these additional amounts, the Attorney General notified East Ohio that these additional taxes had been certified to him together with penalties for collection and demanded payment in an amount in excess of $900,000. (R. 34 and 35.) Thereafter, and within the time provided by statute, East Ohio filed an application with the Tax Commission for a review of and rehearing upon the determination of the gross receipts for the years in question, which the Commission denied. (R. 36.)

East Ohio then filed its Bill of Complaint.

The single issue presented makes important the method of procuring and marketing West Virginia and Pennsylvania gas.

The Hope Company, doing business only in the State of West Virginia, has extensive gas producing fields in that state and the relations between it and East Ohio have been controlled by a gas purchase agreement in force since 1910. This agreement with its modifications is set forth in full in the record. (R. 39.)

All of the gas sold by Hope to East Ohio passes through Hope's Hastings station located in West Virginia approximately twenty-five miles south of the Ohio River. The gas flows from producing wells in various parts of West Virginia through field lines and gathering lines into transmission lines that carry it to Hastings station. At various places along these lines Hope maintains pumping

stations for the purpose and with the effect of facilitating transmission. (R. 28.) At Hastings station the gasoline vapors are removed by what is known as the absorption method which is a continuous process involving no interruption of the flow. The purpose of removing these vapors is to avoid their later collection at low points in the transmission lines, thus interfering with transmission. (R. 28.) After the extraction of the gasoline vapors the gas is passed through a pumping station which maintains a pressure of 200 to 300 pounds per square inch in Hope's transmission lines on the discharge side leading from Hastings station to the Ohio River, the exact amount of pressure maintained being dependent upon the time of year and East Ohio's demand. These pressures are sufficient to carry the gas from Hastings station to burner tips of East Ohio's consumers. (R. 28.)

At the Ohio River the transmission lines of East Ohio and Hope are connected by "river crossings" consisting of a number of smaller pipes crossing the river, connected on each side with the larger transmission lines. The smaller lines can be separately closed on either side of the river so that in the event of leak or washout the continuance of the supply is not imperiled. The exact dividing line between the property owned by Hope and East Ohio is the low water mark on the Ohio side of the river, the cost of the river crossings having been paid by the two companies in the proportions by which they were divided by this line, which is also the boundary line between the two states. (R. 28 and 29.)

From the Ohio River East Ohio maintains and operates four trunk lines 18 to 20 inches in diameter that run north an average distance of 82 miles to what is known as Gross Farm Station in Stark County, Ohio. From this point other trunk lines run northeasterly about 40 miles to a pressure reducing station near Youngstown and still

others a distance of about 40 miles to pressure reducing stations near Cleveland. (R. 29.) A map showing the location of these lines is in evidence. (R. 58.)

The distribution system in each municipality consists of "high pressure" lines and "low pressure" lines. At the pressure reducing stations where the transmission lines are connected with the high pressure distribution lines, and again at the points where the high pressure distribution lines connected with the low pressure distribution lines, regulators are maintained. (R. 30.) These regulators are set at pressure it is desired to maintain on the discharge side. In case this is the high pressure lines, the regulators are set at 30 to 50 pounds per square inch, while in case this is the low pressure lines, they are set at the number of ounces necessary to serve consumers. Automatically the openings in the regulators are enlarged or diminished to permit a faster or slower rate of flow as may be necessary to maintain at all times on the lines on the discharge side the number of pounds or ounces of pressure at which the regulators are set. Gas is constantly flowing through these regulators at a faster or slower rate, depending upon demand. (R. 31.) From the low pressure distribution lines the gas passes directly through service lines owned by the property owner connecting street mains with consumers' appliances. (R. 31.)

The result is that the gas is constantly moving from the time it leaves the producing fields in West Virginia until it reaches its intended destination which is the burner tips of East Ohio's consumers. No interruption of flow occurs at any point in the entire operation. The effect both of pumping and of removing gasoline vapors is to facilitate transmission. (R. 29.)

The Pennsylvania gas is purchased from the Peoples Company principally during the winter season. It comes through Darlington Station owned and operated by the

Peoples Company and located in Pennsylvania about 8 miles from the Ohio line. The transmission lines of the two companies connect at the state line. East Ohio's transmission line from this point runs to Youngstown. The gas is collected in the field, pressure is increased by pumping, gasoline vapors removed and the gas transported and marketed by East Ohio through its distribution system precisely the same as in the case of West Virginia gas. (R. 30.)

The Ohio gas is carried in transmission lines from the Ohio field to the high pressure distribution systems in the municipalities where it is distributed. (R. 30.) Some of the municipalities served get only West Virginia and/or Pennsylvania gas, others get only Ohio gas and still others get mixed Ohio and West Virginia gas, the mixture occurring in the high pressure distribution mains. (R. 36.) Separation of receipts for those communities served with mixed gas was made for each year on the basis of the respective amounts of Ohio and West Virginia gas introduced into the local distribution systems as determined by meters at the points of introduction. (R. 37.)

In addition to excise taxes East Ohio paid during the years in question local real and personal property taxes assessed against it by the Tax Commission and local taxing authorities in excess of $1,000,000 each year. (R. 39.)

SPECIFICATION OF ERRORS RELIED UPON.

1. Said District Court erred in holding that gross receipts of The East Ohio Gas Company from the sale of natural gas purchased by it from the Hope Natural Gas Company of West Virginia and the Peoples Natural Gas Company of Pennsylvania at the Ohio state boundary line, and transported, distributed and sold by The East Ohio Gas Company to consumers in municipalities in the northern and eastern parts of the State of Ohio, are receipts

from intrastate business taxable as such by the excise tax statutes of the State of Ohio (Section 5483 of the Ohio General Code and related sections), and in holding that an order of the Tax Commission of Ohio, fixing such gross receipts as subject to such tax and levying a tax thereon, does not violate the commerce clause (Article I, Section 8) of the Constitution of the United States.

2. Said District Court erred in refusing to grant the injunction prayed for in the Bill of Complaint seeking to enjoin the enforcement of said order of the Tax Commission of Ohio by it and by other officers of the State of Ohio, and in dismissing the Bill of Complaint.

SUMMARY OF ARGUMENT.

I. The issue is narrowed to the question of whether an admittedly interstate movement of natural gas into the state in control of the appellant ends before its delivery to appellant's consumers. That this is so results from these considerations:

(a) The language of the Ohio excise tax statutes as well as their history shows that the tax is levied for the privilege of doing an intrastate business and is to be measured by the gross receipts of that business.

(b) This Court has repeatedly held that the state may not tax the gross receipts of interstate business even though that business is essentially local in character.

(c) This Court has held that the fact that title and possession of natural gas moving in interstate commerce changes at the state boundary line does not affect the character of the movement.

II. The interstate movement in this case continues to consumers' appliances. In *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, it was expressly decided that the local distribution of natural gas by an importing

company is an integral part of interstate commerce. This case is controlling. Moreover, it is supported both by the principle that when an interstate character has been acquired it continues until the commodity "reaches the point where the parties originally intended that the movement should finally end" (*Illinois etc. Railroad Co. v. Railroad Commission*, 236 U. S. 157, 163) and by the principle that where "the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it" it is interstate throughout. (*Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 113). In this case the intended destination from the beginning is East Ohio's consumers and the transmission is as continuous and rapid as science can make it.

Since the movement is conceded to be interstate when the gas enters Ohio there is no logical or practical point to assert a change until the gas reaches consumers' appliances. Suggested analogies that bulk is broken and the gas stored or processed when it passes from transmission to distribution lines of the importing company are inapplicable and contrary to facts.

ARGUMENT.

I. THE ISSUE IS NARROWED TO THIS: DOES THE ADMITTEDLY INTERSTATE MOVEMENT OF NATURAL GAS IMPORTED INTO OHIO BY EAST OHIO END BEFORE ITS DELIVERY TO EAST OHIO'S CONSUMERS?

That the issue is so narrowed results from the following considerations:

(a) The Ohio Excise Tax is for the Privilege of Doing an Intrastate Business and is Measured Solely by the Receipts of that Business.

Ohio Statutes. The pertinent provisions of the statutes of Ohio are as follows, section references being to the Ohio General Code:

"5474. *Contents of statement.*—In the case of all such public utilities except railroad, street, suburban and interurban railroad companies and express, telegraph and telephone companies, such statement shall also contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not, from whatever source derived, for business done within this state for the year next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations, *but this shall not apply to receipts from interstate business, or business done for the federal government.* Such statement shall also contain the total gross receipts of such company for such period in this state from business done within the state." (All italics ours.)

"5475. *Valuation determined.*—On the first Monday of September the commission shall ascertain and determine the entire gross receipts of each electric light, gas, natural gas, pipe line, waterworks, messenger or signal, union depot, heating, cooling and water transportation company for business done within this state for the year then next preceding the first day of May and of each express, telegraph and telephone company for business done within this state for the year ending on the thirtieth day of June, *excluding therefrom, as to each of the companies named in this section, all receipts derived wholly from interstate business or business done for the federal government.*"

"5476. *Gross receipts.*—The amount so ascertained by the commission, in such instance, for the purposes of this act, shall be the gross receipts of such electric light, gas, natural gas, pipe line, waterworks, express, telegraph, telephone, messenger or signal, union depot, heating, cooling or water transportation companies for business done within this state for such year."

"5483. *Excise tax.*—In the month of October, annually, the auditor of state shall charge, for collection

from each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, cooling and water transportation company, *a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intra-state business for the year covered by its annual report to the commission,* as required in this act, by taking one and thirty-five one hundredths per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case."

It is to be observed of these sections:

1. That section 5474 excludes from gross receipts "receipts from interstate business or business done for the federal government."

2. That section 5475 directs the Tax Commission to determine taxable receipts by excluding therefrom "all receipts derived wholly from interstate business or business done for the federal government."

3. That section 5483 imposes an excise tax "for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported by the Commission as the gross receipts of such company on its intrastate business."

History of Ohio Excise Tax. Moreover, a brief reference to the history of the present Ohio statutes shows that the Legislature clearly understood the limit of state power to be that it could levy an excise tax based only on the receipts of intrastate business.

Ohio's first excise tax on the receipts of public utilities was passed in 1896, 92 Ohio Laws 79. It was a tax of one-half of one per cent. of *"the gross receipts of such company for business done within the state of Ohio."* It was thus frankly an excise tax based on the gross receipts

from all business done in the state whether that business was intrastate, interstate, or foreign commerce. The rates provided by this first act were later increased (95 Ohio Laws 139 and 96 Ohio Laws 124), but the measure of the tax remained the same.

In 1908 this Court in *Galveston etc. Railway Co. v. Texas*, 210 U. S. 217, held invalid a Texas statute imposing a tax upon railroads "equal to one per cent. of their gross receipts." Mr. Justice Holmes in delivering the opinion of the Court said, page 224:

> "In *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the State, when such receipts were derived from commerce between the States and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. It cites the earlier cases to the same effect. Later ones are *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411; *Western Union Telegraph Co. v. Pennsylvania*, 128 U. S. 39; *Western Union Telegraph Co. v. Seay*, 132 U. S. 472. See also *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 25; *Ficklen v. Taxing District of Shelby County*, 145 U. S. 1, 22; *New York, Lake Erie & Western R. R. Co. v. Pennsylvania*, 158 U. S. 431, 438; *McHenry v. Alford*, 168 U. S. 651, 670, 671; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 162."

At its next session, 1910, the Ohio Legislature passed a new excise tax law, 101 Ohio Laws 399, §§53, 55, 61, in the form of its present law, purporting to be an excise tax upon the privilege of doing "intra-state business" and excluding from the gross receipts on which the tax is based receipts from "interstate business and business done for the Federal Government." Subsequently that law has been amended only in respect of the rate so that for all

purposes in which we are presently interested it stands today in the precise form in which it was enacted in 1910.

It is obvious from this history that the Legislature, recognizing its inability to base a tax upon gross receipts that included receipts from interstate commerce, attempted to make up part of the revenue of which it was thereby deprived by an increase in the rate. This reason was later urged in *Ohio Tax Cases*, 232 U. S. 576, as a ground of invalidity of the *Ohio* excise tax. It was also urged that since the statute only excluded "receipts from interstate business" it was invalid because it taxed receipts from foreign commerce. This Court, tracing the history of the Ohio legislation, held, however, that from this history it could not hold that the tax was anything other than an excise tax and on gross receipts of intra-state business. And it interpreted the exclusion of receipts from "interstate business" to be but another way of saying that it was attempting to tax only receipts from intra-state business. Upon this point Mr. Justice Pitney said, page 591:

> "Section 97, however, indicates an intent to take into consideration for the purpose of measuring the excise tax only the earnings upon intra-state business, and it seems clear enough that in the former sections the word 'interstate' was used as meaning 'not intra-state,' rather than in its technically correct signification."

It is therefore abundantly clear not only from the language of the act itself but from its history and interpretation by this Court that it assumes to tax only receipts from intra-state commerce and that it does not assume to tax receipts from interstate commerce or business done for the Federal Government.

Even if the state had the power to tax interstate commerce, however local in character, it has clearly not assumed to do so.

(b) A State Excise Tax on Gross Receipts from Interstate Commerce Is Invalid.

The tax in question is neither a property tax nor is it imposed in lieu of a property tax. No claim to the contrary has ever been made. See *Ohio Tax Cases*, 232 U. S. 576. Moreover, the State of Ohio imposes a tax on all real and personal property of public utilities and East Ohio has paid this tax in the years in question in excess of $1,000,000 each year. (R. 39.)

It was recognized below that the State cannot levy an excise tax for the privilege of doing an interstate business or measure such a tax by the gross receipts from that business. Upon this the lower Court said the question was whether the business is

> "interstate commerce, which, it is conceded, can not be burdened by an excise tax. U. S. Constitution, Art 1, sec. 8; *Rosenberger v. Pacific Exp. Co.*, 241 U. S. 48, 50; *New Jersey Telephone Co. v. Tax Board*, 280 U. S. 338, 346."

This had, of course, been decided in *Galveston etc. Railway Co. v. Texas*, 210 U. S. 217, in which, at page 224, Mr. Justice Holmes cited the many previous decisions of this Court upon that point.

Since the decision in the *Galveston* case the same principle has many times been applied, the most recent application being in the case of *New Jersey Bell Telephone Co. v. State Board of Taxes and Assessments of New Jersey*, 280 U. S. 338. That case involved the validity of a New Jersey "franchise tax" of 5% of that part of the telephone company's gross receipts from all its business in the state represented by the proportion that its lines in the public streets bore to the length of its whole lines in the state. Approximately one-fourth of these gross receipts came from interstate commerce. The State also levied and collected taxes on the Company's real and personal property.

In the opinion of the Court by Mr. Justice Butler, page 346, it is said:

> "It is elementary that a State may tax property used to carry on interstate commerce. *But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a State may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end. Pullman Co. v. Richardson,* 261 U. S. 330, 338, and cases cited. *Sprout v. South Bend,* 277 U. S. 163, 171. This tax cannot be sustained if it is not upon the property but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereon."

That a state may not levy an excise tax on interstate commerce even though that commerce is essentially local in character has likewise been held. The difference in this respect between the power of the state to regulate rates and to levy a privilege tax is strikingly illustrated in the two cases of *Port Richmond Ferry v. Hudson County,* 234 U. S. 317, and *City of Sault Ste. Marie v. International Transit Company,* 234 U. S. 333. In the former it was held that a state might regulate the rates to be charged for an interstate ferry service essentially local, while in the latter case, announced at the same time, a state license fee exacted for the privilege of conducting a similar ferry was held invalid.

The New York Court of Appeals has had before it both the right of the state to regulate rates and the right of the state to tax gross receipts of the Pennsylvania Gas Company which procured its supply in Pennsylvania and distributed it locally in New York.

In the first case, *In Re Pennsylvania Gas Company,* 225 N. Y. 397, 122 N. E. 260, that Court in an opinion by

Chief Justice Cardozo held that the interstate movement continued to consumers' appliances, but that since the distribution was local in character the state might regulate the rates to consumers in the absence of congressional action. This case, hereinafter discussed, was affirmed by this Court in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23.

Later there came before the New York Court of Appeals the case of *People Ex Rel. Pennsylvania Gas Company v. Saxe*, 229 N. Y. 446, 128 N. E. 673, in which there was involved the validity of a New York franchise tax assessed against the Pennsylvania Gas Company, the measure of said tax being stated by the statute to be gross earnings "from all sources within this state." The Court thus was required to pass upon the right of the State of New York to tax the gross earnings of the very company whose rates it and this Court had previously held were subject to state regulation. Chief Justice Cardozo again rendered the opinion and held the tax invalid. He said that since the company's sole business was interstate "it is here of right, and the state may not charge it with a tax as a condition of its presence."

We submit that these cases are all correctly decided and that even though the business of East Ohio in distributing gas in Cleveland and other communities is of such a nature that local aspects dominate, it is nevertheless an integral part of interstate commerce not subject to tax.

(c) Delivery at State Line Does Not Change Interstate Character of Movement.

That delivery of gas at the Ohio state line and a change of possession and title at that point is of no significance was decided in *Peoples Gas Co. v. Public Service Commission*, 270 U. S. 550, in respect of natural gas, and *Public*

Utilities Commission v. Attleboro Steam & Electric Co., 273 U. S. 83, in respect of electric energy.

The Peoples Gas Company case involved facts as to the delivery of natural gas by the same West Virginia company that is here involved, namely The Hope Company, to The People's Company of Pennsylvania at the West Virginia-Pennsylvania line with physical situation, method of transmission and relation between the companies the same as here.

In delivering the opinion of this Court Mr. Justice Van Devanter said, page 554:

> *"As respects the West Virginia gas we are of opinion, in view of its continuous transportation from the places of production in one state to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point and show that the passing of custody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business. Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 112, 113; *Public Utilities Commission v. Landon*, 249 U. S. 236, 245; *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 28; *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277, 280-281; *Pennsylvania v. West Virginia*, 262 U. S. 553; *Binderup v. Pathe Exchange*, 263 U. S. 291, 309; *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298; *Ohio Railroad Commission v. Worthington*, 225 U. S. 101; *Lemke v. Farmers Grain Co.*, 258 U. S. 50; *Shafer v. Farmers Grain Co.*, 268 U. S. 189."

II. THE INTERSTATE MOVEMENT IN THIS CASE CONTINUES TO CONSUMERS' APPLIANCES.

(a) Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, is controlling.

In the above case the Pennsylvania Gas Company procured its supply of natural gas in Pennsylvania, transported it to the state of New York and distributed it to consumers in certain cities in that state under local franchises. The New York Public Service Commission asserted jurisdiction over the rates to local consumers. The sole issue presented to the New York Courts and to this Court was whether the relations between the Pennsylvania Company and its local consumers was interstate commerce not subject to state regulation. If that relation were not part of interstate commerce this Court had no jurisdiction.

This Court held that the interstate movement continued to consumers' burner tips. Having thus sustained jurisdiction it further held that the relation between the Pennsylvania Company and its consumers was one in which local aspects rather than national predominated and that in consequence in the absence of congressional action the state could regulate rates.

Previously in *Public Utilities Commission v. Landon*, 249 U. S. 236, this Court had held that gas brought into a state by an importing company and there sold to independent local distributing companies, deliveries being made at the local distribution systems, continued in interstate commerce with national aspects dominant until sale and delivery to the local distributing companies, but that the subsequent distribution and sale by them to consumers was intrastate commerce. The state, therefore, had power to regulate the rates to be paid by consumers but no power over rates paid by the distributing companies.

The *Landon* case having been urged upon the Court in the *Pennsylvania Gas* case on behalf of the New York Public Service Commission, Mr. Justice Day said, page 28:

> "This case differs from *Public Utilities Commission v. Landon*, 249 U. S. 236, wherein we dealt with the piping of natural gas from one State to another, and its sale to independent local gas companies in the receiving State, and held that the retailing of gas by the local companies to their consumers was intrastate commerce and not a continuation of interstate commerce, although the mains of the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce, and therefore, the matter was subject to local regulation.
>
> *"In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York and Pennsylvania, above mentioned. Its transmission is direct, and without intervention of any sort between the seller and the buyer. The transmission is continuous and single and is, in our opinion, a transmission in interstate commerce and therefore subject to applicable constitutional limitations which govern the States in dealing with matters of the character of the one now before us."*

Having determined that the sale of gas by the Pennsylvania Gas Company to its consumers was interstate commerce he then considered whether or not it was interstate commerce of such a nature that the state could not in the exercise of the police power make reasonable regulation of local rates in the absence of congressional action. He pointed out that such a movement in interstate commerce had both national and local aspects; that

in some phases of the movement national aspects were dominant, and in others, local; that in the distribution and sale of gas in the ordinary way to consumers local aspects were dominant; and that in consequence until Congress by appropriate legislation asserted its jurisdiction the state might regulate rates.

This case, therefore, directly holds that the local distribution of gas by an importing company under local franchises is an integral part of interstate commerce. With the question of whether local or national aspects are dominant we are not now concerned. That distinction, however sound as applied to police regulations, has never been applied to taxation by a state.

In *Missouri v. Kansas Gas Co.*, 265 U. S. 298, the question was again presented to this Court of the right of a state to regulate the rates of an importing company selling natural gas to independent local distributing companies. Again this Court in an opinion by Mr. Justice Sutherland affirmed the principles of the *Landon* case, pointed out that "there is nothing in *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23, inconsistent with this view" and held that the state had no power to regulate the price at which the importing company could sell to the independent local distributing companies even in the absence of congressional action.

It is to be noted that in deciding that local distribution in the *Landon* case was intrastate commerce emphasis was placed on the fact that the local distributing companies were "independent" and in no sense representatives of the importing company.

(b) Supporting Decisions of this Court.

In the above decisions the Court was applying a settled principle thus expressed by Mr. Justice McReynolds in *Illinois etc. Railroad Company v. Railroad Commission*, 236 U. S. 157, at page 163:

> "When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And *generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end. McNeill v. Southern Railway,* 202 U. S. 543, 559; *Southern Pacific Terminal v. Interstate Commerce Commission,* 219 U. S. 498, 527; *Ohio Railroad Commission v. Worthington,* 225 U. S. 101, 110; *Texas & New Orleans Railroad v. Sabine Tram Co.,* 227 U. S. 111, 126; *Louisiana Railroad Commission v. Tex. & Pac. Ry.,* 229 U. S. 336, 341."

The principle is also stated in *Western Union Telegraph Co. v. Foster,* 247 U. S. 105, 113; *Southern Railway Co. v. Prescott,* 240 U. S. 632, 639; *Binderup v. Pathe Exchange, Inc.,* 263 U. S. 291, 309.

The application of this principle in the *Landon* case, *supra,* resulted in holding that the interstate movement ended with the sale of gas by the importing company to the local distributing company. The application of this principle in the *Pennsylvania Gas* case, *supra,* resulted in holding that the interstate movement continued until the sale of the gas to the local consumers of the importing company. In other words, in one case the intended destination of the gas was the local distributing company and in the other the local consumers.

Another test of an interstate movement likewise supports the decision in the *Pennsylvania Gas* case.

In *Western Union Telegraph Co. v. Foster,* 247 U. S. 105, the New York Stock Exchange contracted with telegraph companies to furnish them continuous stock quotations to be furnished by them in turn by ticker service to subscribers approved by the Stock Exchange. Under this

contract the quotations as received from the Exchange in New York were wired in Morse Code to Boston where they were decoded and wired to subscribers' tickers, the wires of other companies being in part used in the process. This Court held that the transmission of the quotations remained interstate commerce until completed in the office of subscribers and on page 113 of the opinion Mr. Justice Holmes said:

> "If the normal, contemplated, and followed course is a transmission as continous and rapid as science can make it from exchange to broker's office, it does not matter what are the stages or how little they are secured by covenant or bond."

(c) Application to Facts in this Case.

The language last above quoted reads directly upon the facts of this case. At pumping stations in West Virginia and Pennsylvania the gas is pumped to a pressure sufficient to carry it to consumers' appliances in Ohio. (R. 29, 30.) Only friction in the lines and the reduction of pressures incident to distribution reduce the speed of transmission precisely as an interstate train must reduce speed to discharge passengers. Nevertheless, the transmission remains as continuous and rapid as science can make it. This is the normal, contemplated and followed course.

That in the present case the consumers of East Ohio are the ultimate destination of all West Virginia gas purchased is evidenced not only by all the practical aspects of that movement, but by nearly every paragraph of a contract of more than twenty years' standing with the Hope Company. (R. 39.) In the second "whereas" clause it recites that East Ohio holds franchises and owns distributing systems in Cleveland and other cities and has trunk lines from the Ohio River connected therewith. (R. 40.) In

paragraph "Second" East Ohio agrees to purchase and the Hope Company agrees to furnish "all the natural gas requisite for the supply of domestic consumers" of East Ohio and sufficient to fulfill contracts with industrial consumers "approved" by the Hope Company. (R. 40.) By paragraph "Seventh" the Hope Company is "obligated to deliver gas for domestic consumers of the Ohio Company in preference to all other consumers" excepting only certain other domestic consumers. (R. 43.) By paragraph "Eighth" East Ohio agrees to keep the Hope Company "at all times fully informed of all facts tending to show the amount of natural gas which will be necessary from time to time to supply its requirements" thereunder. (R. 44.) By paragraph "Ninth" East Ohio agrees to keep its transmission lines and distributing systems in good order and condition and to measure the same by standard meters. (R. 44.) By paragraph "Tenth" East Ohio agrees that the Hope Company shall at all times have access to its meters "to measure the amount of gas sold to consumers and the right to examine its meters, pipes and apparatus." (R. 44.) By paragraph "Sixteenth" as amended April 30, 1924, ultimate settlement for gas delivered by the Hope Company to East Ohio is to be made and during the three years in question was made on the basis of the total quantity of gas delivered to East Ohio's consumers as shown by consumers' meters. (R. 55.) By paragraph "Eighteenth" East Ohio is required each month to furnish the Hope Company a detailed statement of the amount of gas charged to its domestic consumers during the preceding month showing separately the amount so supplied in each city and town and other pertinent information. (R. 51.) Finally by paragraph "Twentieth" East Ohio agrees to use diligent effort to maintain and keep up its deliveries of natural gas "under the spirit and intention of this agreement in order that the natural gas which the Hope Com-

pany is prepared to deliver hereunder may find a continuous market." (R. 52.)

Throughout the parties to that contract were intending to procure natural gas in West Virginia for the consumers of East Ohio in Ohio and the practical operation under that contract as set forth in the agreed statement of facts was precisely in accordance with that understanding.

No written contract exists between East Ohio and the Peoples Company for the small amount of gas purchased from that company during the winter months of the years 1927, 1928 and 1929. That gas was, however, received by East Ohio at the state line, transported directly to its distribution systems and distributed to consumers so that without contract and by the usual course of dealing it likewise was destined from the beginning of the movement to East Ohio's consumers' appliances.

It follows that all of the gas procured by East Ohio from the Peoples Company and from the Hope Company continued to be interstate commerce throughout its movement. The amounts received for it from consumers were, therefore, receipts from interstate commerce upon which the state of Ohio under well settled decisions could not impose an excise tax and upon which by the express language of the Ohio Act it did not assume to impose an excise tax.

(d) Comments on Decision Below.

In its *per curiam* the lower Court said that East Ohio's business "was a *local or intrastate* business which might properly thus be taxed." (R. 61.) In so doing the Court assumed that if the business was essentially local it was, therefore, intrastate. Thus the Court did not observe the distinction made in the *Pennsylvania Gas Company* case and others between the national and local aspects of an interstate movement and did not recognize that a business

may be an integral part of interstate commerce even though it is essentially local.

The Attorney General argued below that the interstate movement ended at the "city gate." Presumably by this was meant the points at which the gas passes from the transmission lines into the high pressure distribution lines. The Court below, following this theory, suggested certain analogies in the following language:

> "Thus bulk must be considered as broken when the gas passed from the great gas transportation lines into the network of smaller distributing lines, in analogy to the original package doctrine; the interstate journey must be considered as ended when the gas is placed in proper containers, be these tanks or low pressure distribution system, for delivery to local trade, in analogy to the storage cases (*Atlantic Coast Line v. Standard Oil Co.*, 275 U. S. 257, 269); the gas must be considered processed and modified in an essential characteristic when its pressure is so reduced as to make it available for consumers' use, if analogy to the processing of goods, as breaking the interstate journey, be drawn; and, so far as the relationship between the company and consumers is concerned, it makes no difference whatever to the latter whence comes the gas. The trade was essentially local. The transportation of the gas from West Virginia was but a preparation for it. *Wagner v. City of Covington*, 251 U. S. 95, 103." (R. 61-62.)

All of the analogies suggested by the lower Court were urged upon the New York Court of Appeals in *In Re Pennsylvania Gas Company*, 225 N. Y. 397, 122 N. E. 260. They were also urged upon this Court when that case came before it, but are not discussed in the opinion.

In the opinion below Chief Justice Cardozo considered these analogies and we beg leave to quote at some length his reasons for rejecting them. He said, 122 N. E. 261-262:

> "Interstate commerce does not end until the subject-matter of the sale has been broken up or redis-

tributed or absorbed in the common mass of property within the state. *Leisy v. Hardin, supra.* (135 U. S. 100.) When that moment arrives is not always easy to determine. The test to be applied will vary with the method of transportation and the subject of the sale. * * * But the rule of the 'original package' is not an ultimate principle. It is an illustration of a principle. It assumes transmission in packages, and then supplies a test of the unity of the transaction. If other forms of transmission are employed, there is need of other tests. [Citing Cases.] * * * The law does not ask itself what the parties 'may' do, but what, in the normal course of business, it is expected that they 'will' do. 'If the normal, contemplated, and followed course is a transmission as continuous and rapid as science can make it from exchange to broker's office, it does not matter what are the stages or how little they are secured by covenant or bond.' *W. U. Tel. Co. v. Foster, supra,* 247 U. S. at page 113, 38 Sup. Ct. at page 439, 62 L. Ed. 1006. The essential unity of the transaction remains the final test. *Swift & Co. v. U. S.,* 196 U. S. 375, 399, 25 Sup. Ct. 276, 49 L. Ed. 518; *Rearick v. Pennsylvania,* 203 U. S. 507, 512, 27 Sup. Ct. 159, 51 L. Ed. 295.

"Subjected to that test, the transactions of the petitioner's business have the unity and directness of interstate commerce. There is no break in the continuity of the transmission from pumping station in Pennsylvania to home and office and factory in Jamestown. A different question would arise if gas transmitted from Pennsylvania should be stored in reservoirs in New York, and then distributed to consumers as their needs might afterwards develop. The quantity stored or the period of storage might require us to hold that interstate commerce was at an end when the place of storage had been reached. *Kehrer v. Stewart,* 197 U. S. 60, 65, 25 Sup. Ct. 403, 49 L. Ed. 663; *Brown v. Houston,* 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257. The transactions would then be similar to those common in the oil business. We do not now determine the rule that should govern them. It is enough to hold

that where there is in substance no storage, but merely transmission for immediate or practically immediate use, direct from seller to consumer, interstate commerce does not end till the gas has reached its goal. That, by the fair intendment of the petition, is the business conducted by this petitioner. It is not important that consumers do not signify in advance the precise amount that they will need. If their wants are approximately known, and the gas is transmitted, not to be held, but to be used, so that any storage that results is merely casual and incidental, the transaction is to be treated as single and continuous. We must then say, in the language of Holmes, *J.*, in *W. U. Tel. Co. v. Foster, supra,* that the transmission is 'as continuous and rapid as science can make it.' "

The methods of transporting and distributing natural gas are standard. In the *Pennsylvania Gas* case they were undoubtedly in all essentials the same as in this case.

The truth is, as Chief Justice Cardozo held, that none of the analogies suggested by the lower Court have the slightest applicability here. Repeatedly this Court has said "interstate commerce is a practical conception" and "the essential nature of the movement" determines its character. The practical fact is that we have here principally two companies, one engaged in producing and the other engaged in distributing natural gas, their properties and their business being separated by state lines, but both owned by a common owner. Practically and commercially it is a single enterprise for the production of gas in one state and its sale and distribution in another. Actually the gas passes, and from the beginning of the movement is intended to pass, without interruption from producing fields to consumers' burner tips. There is no more reason for selecting the so-called "city gate" as the termination of that movement than for the selection of any other point along the line.

The truth is that the adoption of a descriptive word such as "city gate" is apt to confuse. There is no "city gate." At various places the distribution systems are connected with the transmission lines by means of regulators. But nothing of significance happens at those points. "Gas is constantly flowing through these regulators at a slower or faster rate depending upon demand" (R. 31).

No deliveries are made at those points.

No breaking of bulk occurs there because the gas is not packaged.

No gas is put into containers or storage at those points or elsewhere. The pipe lines from producing fields to consumers is a continuous and the only container through which the gas constantly moves.

No processing occurs at those points or elsewhere, although it is true that the pressure during transmission is higher than the pressures either in the producing fields, the gathering lines or the distribution systems. This change in pressure, however, produces no change in the nature of the gas that by even remote analogy can be termed "processing." Moreover, the sole purpose of increasing pressure is to facilitate transmission. It would be strange indeed if the quality of natural gas that makes it possible to transport it long distances in interstate commerce should now be held to destroy its character as such before it reaches the destination it was compressed to reach.

And it is of no more importance that East Ohio's consumers do not expressly contract for West Virginia gas than it was in *Lemke v. Farmers Grain Co.*, 258 U. S. 50, and *Shafer v. Farmers Grain Co.*, 268 U. S. 176, that the farmers selling grain to local elevators in North Dakota did not contract that the grain should be shipped out of the state, or that the local purchasers of products in original packages do not specify products produced in other

states. *Bowman v. Continental Oil Co.*, 256 U. S. 642, and other similar cases.

The fact is that if this movement is an interstate movement at the time it crosses the Ohio state boundary line, of which there is no dispute, there is no logical or practical place to assert a change in the character of that movement until it reaches the only destination intended for it, namely consumers' appliances. Fiction and not fact will control if it is held otherwise.

The decision of the lower Court should be reversed and injunction allowed as prayed.

Respectfully submitted,

WILLIAM B. COCKLEY,
THOMAS H. HOGSETT,
THOMAS M. HARMAN,
Attorneys for Appellant.

INDEX.

The Interstate Movement Continues to Consumers' Appliances 1

Sales by East Ohio to Consumers Included as Part of Interstate Commerce 6

Comment on Other Matters 8

Cases Cited.

Atlantic Coast Railway Co. v. Standard Oil, 275 U. S. 257 3

Banker Bros. Co. v. Pennsylvania, 222 U. S. 210 7

Blumenstock Bros. Adv. Co. v. Curtis Publishing Co., 252 U. S. 436 7

Bowman v. Continental Oil Co., 256 U. S. 642 6

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 6

Galloway v. Bell, 11 F. 2nd 558 (Certiorari denied 271 U. S. 666) 2

Gas Co. v. Towers, 134 Md. 137, 106 Atl. 265 2

Hallanan v. Eureka Pipe Line Co., 261 U. S. 393 6

Landon v. Commission, 242 Fed. 658, 665 2

Lemke v. Farmers Grain Co., 258 U. S. 50 6

Missouri v. Kansas Gas Co., 265 U. S. 298 6

Moore v. United States Cotton Exchange, 270 U. S. 593 7

Ohio Tax Cases, 232 U. S. 576 9

Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23 ..... 2, 6

Pennsylvania v. West Virginia, 262 U. S. 553, 556 .. 1

Peoples Natural Gas Co. v. Public Service Commission, 270 U. S. 550 ..... 2, 5

Public Utilities Commission v. Landon, 249 U. S. 236 .. 2, 6

Ratterman v. Western Union Telegraph Co., 127 U. S. 411 6

Shafer v. Farmers Grain Co., 268 U. S. 189 6

State ex rel. v. Flannelly, 96 Kan. 372, 152 Pac. 22 2

U. S. F. & G. Co. v. Kentucky, 231 U. S. 394 7

Ware and Leland v. Mobile County, 209 U. S. 405 7

In the Supreme Court of the United States

OCTOBER TERM 1930.

No. 453.

THE EAST OHIO GAS COMPANY,
Appellant,

vs.

THE TAX COMMISSION OF OHIO, *et al.*,
Appellees.

REPLY BRIEF OF APPELLANT.

THE INTERSTATE MOVEMENT CONTINUES TO CONSUMERS' APPLIANCES.

When the States of Ohio and Pennsylvania attacked in this Court a statute of West Virginia requiring natural gas companies in that state to satisfy local demands before transporting gas from the state, they urged upon this Court this position:

> "The course of the gas from the well to the *ultimate consumers* in Pennsylvania and Ohio is determined by existing contract relations, public service duties in other States, long-established courses of business and the physical structures adapted thereto. *The gas that goes into other States is actually in interstate commerce from the time it leaves the wells until it reaches the ultimate consumers. United Fuel Gas Co. v. Hallanan*, 78 W. Va. 396; 257 U. S. 277; *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23."

Pennsylvania v. West Virginia, 262 U. S. 553, 556.

Having succeeded in retaining a full supply for Ohio on that theory the state now takes the position that while the interstate movement continues in Ohio an average distance of approximately 120 miles, it ceases when the gas enters the distribution systems of the municipalities served.

Although no sale is there made and no change in title or possession or interruption of the continuity of the movement there occurs, the state claims that by analogy certain things may be supposed to have there occurred that in fact do not occur.

It is suggested that this Court hold "that metaphorically the package is broken." (Brief, 17.) This is an admission that the fact is otherwise.

The case which is referred to as the "leading case" for the application of the original package doctrine to natural gas, to-wit, *State ex rel. v. Flannelly*, 96 Kan. 372, 152 Pac. 22, was a part of the history of *Public Utilities Commission v. Landon*, 249 U. S. 236. (See *Landon v. Commission*, 242 Fed. 658, 665.) Both the *Flannelly* case and the applicability of the original package doctrine were urged upon this Court in the *Pennsylvania Gas case*, 252 U. S. 23, but were properly ignored in the opinion. Likewise the three Pennsylvania lower court decisions cited (Brief, 16) were before this Court in *Peoples Gas Co. v. Commission*, 270 U. S. 550, and were not followed. Thus the applicability of the original package doctrine has repeatedly been urged upon this Court without success.

The case of *Gas Co. v. Towers*, 134 Md. 137, 106 Atl. 265 (Brief, 16) was decided prior even to the decision of this Court in the *Landon* case.

Galloway v. Bell, 11 F. 2nd 558 (Certiorari denied 271 U. S. 666) merely held that gas supplied by one company to another across the District of Columbia boundary was interstate commerce and said in the paragraph quoted by

the Appellees (Brief, 16) that the "federal authorities," meaning the district commission and courts, had nothing to do with the relations between the Maryland Company and its Maryland consumers.

Again, it is suggested that processing be considered to have occurred in the distribution systems because of reductions in pressure. If East Ohio were to contract with a single industry in Cleveland to furnish its requirements of natural gas and were then to lay a pipe line direct to its factory from a producing well in West Virginia, there would be no doubt that the movement of that gas is interstate from beginning to end and the receipts from its sale, receipts from interstate commerce. It is, however, not commercially feasible to do this. In place of thousands of such separate lines East Ohio has combined all of these lines for purposes of economical transportation from West Virginia to the municipalities served, but the essential nature of the transaction remains precisely the same. The pressure is first increased in West Virginia where it enters the large transmission lines and is then reduced in Ohio for purposes of distribution and economical consumption. But there is no change in the nature of the product. It ends as it begins; gas in its natural state. The only operation that remotely resembles processing is the extraction of gasoline vapors which occurs in West Virginia. (R. 28)

Again, we are asked to assume that a gas distributing system is a warehouse or storage tank. Storage of natural gas has never been practicable. The quantities required and the price at which it is sold are such that storage reservoirs or tanks have never been employed in the industry. In *Atlantic Coast Railway Co. v. Standard Oil*, 275 U. S. 257, not only did storage actually take place in seaboard tanks for a period of thirty to ninety days, but the seaboard storage points were the only places of destination contemplated by the parties and their contracts

at the time the oils started their interstate movement. Such a case has no application here where the gas is transported to Cleveland and other communities for immediate and direct delivery to consumers in fulfilment of obligations previously incurred. The agreed facts are that the gas is constantly moving from transmission lines into high pressure distribution lines, from these into low pressure distribution lines and from these through service lines into consumers' appliances. (R. 31.) The only gas not in movement in the entire system is insignificant quantities in service lines at such times, and at such times only, as all of a consumer's appliances are shut off. (R. 31.) Since nearly all of them have hot water tanks this rarely occurs. Gas in constant movement to its destination is not in storage.

To apply any one of these analogies is to deny that interstate commerce is a "practical conception" determined by the "essential character of the movement" and to substitute fiction for fact.

Finally, it is claimed that there is a commingling of the imported gas in such fashion as makes it impossible to determine with accuracy the gross receipts from its sale and further indicates that the interstate movement has ended. Of course this argument cannot be made as to a large part of the receipts. Youngstown, Warren, Canton, Massillon and other municipalities are served entirely with West Virginia gas except for insignificant quantities of Ohio gas in Canton and Massillon during the year 1929. (R. 29, 36 and 37.) Any argument as to the effect of commingling can at most be applicable only to gas served in Akron and in Cleveland and nine of its suburbs. (R. 37.)

Cleveland and these nine suburbs have interconnected distribution systems. The Ohio and West Virginia gases carried by separate transmission lines are introduced into the distribution system and measured at the time of their

introduction by border meters. (R. 37.) Yearly receipts are then apportioned on the basis of the yearly amounts of the two gases introduced into the distribution system. While there is some difference in the sliding scale rate structures in effect in these municipalities the average price per thousand cubic feet "is practically the same." (R. 38.) The Akron receipts are apportioned in the same way on the basis of border meter readings.

It would thus seem that there is an unquestionably accurate separation of receipts in Akron and for all practical purposes an accurate separation in the Cleveland district. The detailed figures showing the exact results of applying these methods are fully set forth in the record. (R. 36-39.) All service and minimum charges were everywhere treated as intrastate receipts and the tax thereon paid. (R. 36, 38.)

As to the effect of the commingling upon the interstate movement, that question has several times been before this Court and it has uniformly held that the introduction of local gas or oil into an interstate stream does not affect the interstate character of the movement where the amounts of each are known.

Peoples Natural Gas Co. v. Public Service Commission, 270 U. S. 550, in which Mr. Justice Van Devanter said, page 554:

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other. *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265; *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277, 281.

And see *Hallanan v. Eureka Pipe Line Co.*, 261 U. S. 393; *Hallanan v. United Fuel Gas Co.*, 261 U. S. 398."

Moreover if it were true that no accurate separation could be made, the question then arises as to the validity of the Ohio tax in its entirety. Where separation is possible, as we think it clearly is here, the Court will only enjoin that part of the tax imposed on interstate receipts. Where, however, separation is impossible the tax in its entirety is invalid.

Ratterman v. Western Union Telegraph Co., 127 U. S. 411;

Bowman v. Continental Oil Co., 256 U. S. 642, and cases therein cited;

Hallanan v. Eureka Pipe Line Co., 261 U. S. 393.

SALES BY EAST OHIO TO CONSUMERS INCLUDED AS PART OF INTERSTATE COMMERCE.

This Court in many cases has held that where as a practical matter a movement is essentially one in interstate commerce there is included as a part of it the contract of purchase at the beginning,

Lemke v. Farmers Grain Co., 258 U. S. 50;

Shafer v. Farmers Grain Co., 268 U. S. 189;

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282;

and the contract of sale at the end.

Bowman v. Continental Oil Co., 256 U. S. 642;

Public Utility Commission v. Landon, 249 U. S. 236;

Missouri v. Kansas Gas Co., 265 U. S. 298.

Necessarily the Court decided that same question in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23. The question there was the right of the state to regulate the price the local consumer must pay to the local

distributing company. If that price was a part of interstate commerce, as the Court there held, it became in the hands of the gas company receipts from interstate commerce. Doubtless in that case the consumer did not care whether his gas came from New York or Pennsylvania and the case did not turn upon any question of whether the contract specified gas from out the state.

The Appellees, however, urge the applicability of the following cases:

Ware and Leland v. Mobile County, 209 U. S. 405;
Banker Bros. Co. v. Pennsylvania, 222 U. S. 210;
U. S. F. & G. Co. v. Kentucky, 231 U. S. 394;
Blumenstock Bros. Adv. Co. v. Curtis Publishing Co., 252 U. S. 436;
Moore v. United States Cotton Exchange, 270 U. S. 593.

The principle of these cases is illustrated by a broker in the business of executing orders on an exchange that may result in contracts between citizens of different states and may be performed by an interstate movement of merchandise. The contracts neither require nor do they or the course of business contemplate that there will be any interstate transmission of merchandise or intelligence. If they did contemplate such an interstate movement the function of the broker is purely incidental to it and the licensing of such a broker without any direct effect upon interstate commerce. Even where a state tax is measured in part by the commissions received by such broker, there is no direct burden on interstate commerce nor is the tax in any way measured by the receipts of that commerce.

In *Banker Bros. Co. v. Pennsylvania, supra*, the automobile had been shipped from out the state to the vendor and had come to rest in his place of business before delivery under his contract with the vendee.

COMMENT ON OTHER MATTERS.

As a conclusion the Appellees point out what are alleged to be the deplorable consequences to the State of Ohio if it cannot impose such a tax as that in question. All that is said in favor of such a tax could be said with equal propriety in favor of a tax on the gross receipts of some other form of transportation beginning or ending in Ohio. Such a tax is not justified merely because it is a fair tax and is levied without discrimination upon the receipts of both intrastate and interstate business.

If, as the Attorney General supposes, distribution of natural gas and electricity in the future should be in the hands of large companies operating in many states, the appropriate and indicated method of their control will lie not by action of the separate states but by action of the federal government. A great system of natural gas transportation and distribution cannot be effectively regulated by the independent action of each state influenced by its own selfish point of view. The larger such a system becomes the more imperative becomes the need of control by Congress.

But if the Attorney General's position is here sustained and it is held that the business of local distribution is no part of an interstate movement regulation by Congress will be impossible. As the law now stands the state may regulate local distribution until Congress sees fit to occupy the field. If the time comes that the whole business becomes national in character and scope Congress can take over the task.

Indeed, precisely that evolution has occurred in the case of other utilities. The Interstate Commerce Commission was not given control over telephone and telegraph companies until 1910. Extensions of its jurisdiction are constantly under consideration. When the time comes in

the natural gas industry, which the Attorney General prophesies, effective regulation will be national and not state.

With entire deference to the views of the Attorney General we respectfully suggest that it is much more important to the State of Ohio that the power to regulate rates and other matters connected with the distribution of electricity and gas be preserved to the federal government than it is for the state to establish the right to levy a tax on the gross receipts of this business.

In the original brief we neglected to point out the statutes of Ohio that make necessary injunctive relief. These provide that excise taxes shall be paid on December 15th of each year; that upon failure to pay the same on that date they shall become a lien on all real and personal property in Ohio; that the Secretary of State shall cancel the articles of incorporation of any company failing to pay the same within a certain time after the same is certified to him by the Tax Commission as delinquent; that the Attorney General may procure an injunction in the courts of Ohio against a company continuing to do business in this state that has failed to pay its excise tax and impose other burdens and penalties upon any company failing to comply with the statute, all of which are more specifically pleaded in the bill. (R. 8 and 9.)

In the Agreed Statement of Facts it is recited that the defendants will unless restrained "exercise the powers respectively conferred upon them by the statutes of the State of Ohio" to collect all taxes and penalties for the years in question. (R. 39)

In addition averment and proof is made that East Ohio owns real estate in Ohio and that the lien will become a cloud upon its title. (R. 2, 27.) *Ohio Tax Cases*, 232 U. S. 576.

Since there is no dispute as to the amount of the tax the judgment of the lower Court should be reversed and an injunction granted in accordance with the prayer of the petition.

Respectfully submitted,

WILLIAM B. COCKLEY,
THOMAS H. HOGSETT,
THOMAS M. HARMAN,
Attorneys for the Appellant.

FILE COPY

Office Supreme Court, U. S.
FILED
APR 17 1931
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 453.

THE EAST OHIO GAS COMPANY,
Appellant,
vs.
THE TAX COMMISSION OF OHIO, ET AL.,
Appellees.

BRIEF OF APPELLEES.

GILBERT BETTMAN,
Attorney General of Ohio,
Solicitor for Appellees.

L. F. LAYLIN,
WILLIAM J. FORD,
Of Counsel.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

INDEX.

Subject Index.

Statement of the case 1
History and issues 1
The facts 3
Pertinent Ohio laws 6
Attorneys general rulings 9
Argument 10
Point A—Business of local gas distribution is not interstate commerce 10
Decision of this and other courts upon the question 10
Decisions of other courts 15
Interstate transportation ended—"Original package", "processing", "storage", "commingling" analogies considered 16
Similar types of business not interstate commerce 22

Index.

Point B—Sales of natural gas from a citizen of one state to a citizen of the same state, under a contract which neither expressly nor impliedly provides that the commodity so sold is to be transported across state lines, do not constitute interstate commerce, even though a part of the gas furnished in performing the contract has its origin outside of the state.... 30
Authorities relied upon by opposing counsel... 38
The taxing statute here involved is broad enough to cover the business of appellant..... 44
Conclusion 45

Table of Cases.

Atlantic Coast Railway Co. v. Standard Oil Co., 275 U. S., 257 .....20, 23
Banker Bros. Co. v. Pennsylvania, 222 U. S., 216... 33
Blumenstock Bros. Advertising Co. v. Curtis Publishing Co., 252 U. S., 436..... 36
Brown v. Maryland, 12 Wheat, 441..... 20
City of Sault St. Marie v. International Transit Co., 234 U. S., 333..... 42
Cooley on Taxation, 4th Ed., pp. 802-803..... 31
Franke v. Supply Company, 70 Pa. Sup. Ct., 446.... 16
Galloway v. Bell, 11 Fed. (2d), 588..... 15
Galveston Railway Co. v. Texas, 210 U. S., 217..... 44
Gas Company v. Towers, 106 Atl., 265..... 16
Gas Company v. Commission, 70 Pa. Sup. Ct., 472... 16
H. P. Hodd & Sons v. Commonwealth, 235 Mass., 572 28
Missouri v. Kansas Natural Gas Company, 265 U. S., 298 .....13, 39

Moore v. United States Cotton Exchange, et al., 270 U. S., 593 36
Myron Green Cafeteria Co. v. Kansas City, et al., 283 Mo., 519 28
New Jersey Bell Telephone Company v. State Board of Taxes and Assessments, 280 U. S., 338 42
Pennsylvania Gas Company v. Public Service Commission, 252 U. S., 23 38
People, ex rel. v. Saxe, 229 N. Y., 446 42
Peoples Gas Company v. Public Service Commission, 270 U. S., 550 ..... 38, 39
Port Richmond Ferry v. Hudson County, 234 U. S., 317 42
Public Utilities Commission v. Landon, 249 U. S., 236 10
Public Utilities Commission v. Attleboro Steam and Electric Company, 273 U. S., 83 41
Standard Oil Co. v. Atlantic Coast Line, 13 Fed., 633 25
State, ex rel. v. Knight, 192 U. S., 21 28
State, ex rel. v. Flannelly, 96 Kans., 372 17
Steel Company v. Supply Co., 70 Pa. Sup. Ct., 464 .. 16
United Fuel Gas Co. v. Railroad Commission, 278 U. S., 300 12
United States Fidelity and Guaranty Co. v. Kentucky, 231 U. S., 394 35
Ward Baking Co. v. Federal Trade Commission, 264 Fed., 320 28
Ware and Leland v. Mobile County, 209 U. S., 405 .. 32
Wagner v. City of Covington, 251 U. S., 95 ..... 27, 43
Western Cartridge Co. v. Emmerson, 281 U. S., 511 .. 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 453.

THE EAST OHIO GAS COMPANY,

Appellant,

vs.

THE TAX COMMISSION OF OHIO, ET AL.,

Appellees.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

History and Issue.

This action was brought originally to enjoin the collection of nearly a million dollars in excise taxes assessed by the Tax Commission of Ohio against The East Ohio Gas Company for the years 1927, 1928 and 1929 for business done in Ohio in the local distribution of natural gas.

The disputed tax was based upon the estimated part of the total sales of gas made locally in various communities by The East Ohio Gas Company which represented the sale of gas purchased by the company from other companies outside of the state and delivered by such companies to The East Ohio Gas Company at the state line. The company admits the validity of, and has paid, the tax on that part of the total sales of gas estimated to have been made with gas which it itself produced in Ohio, but as to that part originating outside of the state, the company claims the tax to be invalid as a burden on interstate commerce. The state claims that the entire retail distribution business of the company is local in character and therefore subject to the tax. A statutory court, composed of Circuit Judge Smith Hickenlooper and District Judges Benson W. Hough and Robert R. Nevin, upheld the view of the state, and refused the injunction. The opinion of this court is found in the record commencing at page 59, and is reported in 43 Fed. (2nd), 170. The case is here on direct appeal.

The issue is whether the state of Ohio can levy an excise tax upon all the company's business of local natural gas distribution, although a part of the gas so sold was produced outside of the state of Ohio.

The Facts.

The appellant, The East Ohio Gas Company, which will hereinafter be referred to as "East Ohio", is an Ohio corporation engaged in the production, transportation and distribution of natural gas wholly within the state of Ohio (R., 27). The distribution is made to more than four hundred and fifty thousand local consumers in fifty municipalities in the northern and eastern parts of Ohio under local franchises, (R., 27).

A portion of the gas sold is obtained from East Ohio's own fields located in the state of Ohio. (R., 30.) During the years here in question East Ohio obtained approximately 72% of the gas which it distributed to Ohio consumers through contract with the Hope Natural Gas Company of West Virginia, such gas being produced in West Virginia and delivered at the state line into pipe lines owned by East Ohio. (R., 27, 28 and 29.) Approximately 3% of the total gas sold by East Ohio is secured in a similar manner from the Peoples Natural Gas Company of Pennsylvania. (R., 30.) The remaining 25% of gas sold in Ohio by the company is the result of its own production within the state. (R., 30.)

East Ohio, the Hope Company and the Peoples Natural Gas Company are almost wholly owned by the Standard Oil Company of New Jersey and were so owned at all times herein material. (R., 28.)

Certain of the communities served by East Ohio re-

ceive gas produced only outside of the state. By far the larger number of consumers, however, receive gas which is a mixture of West Virginia and Ohio gas. (R., 36, 37.) The West Virginia gas is, in most instances, brought to the city gate intact in the transmission lines under varying pressures of from two to three hundred pounds. (R., 29.) There at pressure reducing stations this is reduced to from thirty to fifty pounds, when it is fed into the high pressure mains of the local distribution system. It is in these high pressure mains that the Ohio gas is commingled with that brought from West Virginia. Throughout the local communities there are located a number of other regulator stations which again reduce the pressure to the requisite number of ounces at which it should be carried for domestic use and it then is conveyed in low pressure mains to the thousands of service pipes which connect with the individual consumer's premises. (R., 31.)

While there is no doubt a constant flow of gas through the main transmission lines of East Ohio from points outside the state, it is not true that there is no interruption in the flow of gas so far as the individual consumers served are concerned. The gas, when it reaches the premises of an individual consumer, flows into the service lines belonging to the consumer. It there becomes subject to the will of the consumer and, if he should not be using any of his appliances, the flow ceases and the gas becomes stationary in his pipes. The number of consumers in any given community is constantly changing, and new connections are constantly being made. It

is quite obvious that the gas which flows immediately from the low pressure main into the service line of a consumer was not brought from West Virginia pursuant to any contractual relationship between the company and that particular individual. (R., 31.)

In those communities which are served with a mixture of Ohio and West Virginia gas, the proportion of these two varies from day to day. In those communities which are served by interconnecting pipes with a mixture of Ohio and West Virginia gas (and these communities produce the major portion of the gross receipts of East Ohio), there is no way of ascertaining just how much Ohio gas is consumed in any particular community. (R., 38.) These communities have varying schedules of rates, although the average rate per thousand cubic feet in each community is approximately the same. The only method by which East Ohio claims to apportion its receipts as between West Virginia gas and Ohio gas is to determine the yearly amount of gas from Ohio and West Virginia, respectively, put into the general distribution systems, covering several communities, and arbitrarily apportion the gross receipts from all of these communities in like proportion. (R., 38.) Manifestly such apportionment, while perhaps a rough approximation, is by no means accurate.

It is to be observed also that East Ohio maintains in its rate schedules a service, and in some instances a minimum charge which must be paid monthly irrespective of whether any gas is used or not. By reason of these charges, payments are made by the consumers simply

because the company is ready to serve them and not because of any gas being furnished. (R., 32.)

In order to secure gas from East Ohio, individual domestic consumers are required to sign at the local offices of the company a contract which is in form set forth in full in the transcript of the record at page 32. The contract (1) is between two Ohio citizens, (2) is made in Ohio, (3) is performed in Ohio, and (4) does not specify whether the gas furnished by the company thereunder shall have its origin within or without the state.

Pertinent Ohio Law:—Ohio Levies Upon Natural Gas Companies an Excise Tax for the Privilege of Doing Business—the Tax Being Measured by the Receipts from Business Done Within the State.

The state of Ohio levies excise taxes upon practically all types of public utilities. These utilities are defined in Section 5416 of the General Code, and, so far as pertinent to the present issue, that section provides:

> "That any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:
>
> * * *
>
> When engaged in the business of supplying natural gas for lighting, heating or power purposes, to consumers within this state, is a natural gas company;
>
> When engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partially within this state, is a pipe line company; * * *"

By the terms of Section 5470 of the General Code, an annual statement to the Ohio Tax Commission is required of each utility and the succeeding section provides certain of the items which must be included in such report. Section 5474 provides as follows:

> "In the case of such public utilities * * * such statement shall also contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not, from whatever source derived, for business done within this state * * * but this shall not apply to receipts from interstate business, or business done for the federal government. Such statement shall also contain the total gross receipts of such company for such period in this state from business done within the state."

Section 5475, General Code, then provides:

> "On the first Monday of September the commission shall ascertain and determine the entire gross receipts of each * * * natural gas * * * company for business done within this state for the year then next preceding the first day of May, * * * excluding therefrom as to each of the companies named in this section, all receipts derived wholly from interstate business or business done for the federal government."

After certification of the amount of the gross receipts to the auditor of state, the tax due is computed in accordance with the terms of 5483, which makes provision as follows:

> "In the month of October, annually, the auditor of state shall charge, for collection from each * * * natural gas * * * company, a sum in the nature of an excise tax, for the privilege of carrying on its

> intrastate business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intrastate business for the year covered by its annual report to the commission, as required in this act, by taking one and thirty-five one hundredths per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case."

For accuracy, it must be borne in mind that the excise tax here involved is one imposed, in the words of Section 5416 of the Code, upon a company "engaged in the business of supplying natural gas for lighting, heating or power purposes, to consumers within this state." An entirely different excise tax is imposed upon the transportation of gas, since the same section defines a pipe line company as a corporation "engaged in the business of transporting natural gas or oil through pipes or tubing either wholly or partially within this state." Thus it appears that in the taxation of natural gas companies, it was not the intention of the legislature to tax transportation, as such, although transportation necessarily forms a part of practically every type of business in commodities and so is incidentally involved in any business tax. The tax here is to be clearly distinguished from a direct tax upon transportation and it differs in no essential respect from the tax upon the ordinary transaction of barter and sale, whereby a commodity changes hands. The two businesses of transportation of natural gas and supplying gas to consumers are separated by the terms of the same statute.

It will thus be seen that Ohio levies an excise tax upon all public utilities engaged in the business of the local distribution of natural gas, which tax is based upon the gross receipts "for business done within this state," excluding therefrom the gross receipts of business done in interstate commerce and with the federal government.

Attorneys General Rulings.

During the years prior to 1927, East Ohio paid without question the excise tax upon all of its gross receipts. In that year, however, a former attorney general rendered an opinion that the excise tax under the provisions of the Ohio laws heretofore mentioned could not be assessed against an electric light company which purchased electricity in West Virginia and delivered it to consumers in Ohio. As a consequence, East Ohio continued to pay the tax on receipts from sales of Ohio produced gas, but refused to pay the tax upon its gross receipts from local sales to consumers within Ohio which it effected by the supply of gas which had its origin outside of the state.

In 1929 the present attorney general reversed the holding of his predecessor, advised the Tax Commission to assess the tax upon all business done by East Ohio wherever the source of the gas, and thereupon the commission took proper statutory steps to effect the collection of the proportion of the tax which the company failed to pay for the years 1927, 1928 and 1929. The action below was instituted to enjoin the state officials from enforcing the payment of the disputed tax, which amounts to the sum of $959,753.07.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point A. A state may validly levy an excise tax upon the business of a domestic public utility engaged in the local distribution of natural gas, based upon all of its gross receipts from such business, although a portion of the gas so distributed has its origin outside of the state.

Point B. Sales of natural gas from a citizen of one state to a citizen of the same state, under a contract which neither expressly nor impliedly provides that the commodity so sold is to be transported across state lines, do not constitute interstate commerce, even though a part of the gas furnished in performing the contract has its origin outside of the state.

POINT A.

THE BUSINESS OF LOCAL GAS DISTRIBUTION IS NOT INTERSTATE COMMERCE.

Decisions of the Supreme Court.

This court has categorically held that a company when engaged in a local gas distribution business is not engaging in interstate commerce even though the gas so sold originated outside of the state.

In the case of *Public Utilities Commission v. Landon*, 249 U. S., 236, the question before the court was the right

of the Kansas Utilities Commission to regulate the prices under which gas produced outside of Kansas was sold to consumers in Kansas. Gas was sold to the local companies by the receivers of the Kansas Natural Gas Company at wholesale and the case was one to enjoin the enforcement of local rates on the claim that they indirectly burdened interstate commerce. To all intents and purposes the physical situation was the same as that before the court here with the exception that the gas was delivered at the gates of the several municipalities in Kansas rather than at the state line. The lower court held that the action of the commission was a burden upon interstate commerce and allowed the injunction. The Supreme Court reversed this conclusion and held specifically that the business of the local companies in distributing gas received from the Kansas Natural Gas Company was wholly intrastate. In the opinion of the court, speaking through Mr. Justice McReynolds, appears the following:

> "But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burner tips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their own local business. Payment to the receivers of sums amounting to two-thirds of the product of these sales did not make them integral parts of their interstate business. In fact, they lacked authority to engage, by agent or otherwise, in the retail transactions carried on by the local companies. Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known

commercial methods. Rearick v. Pennsylvania, 203 U. S., 507, 512, 51 L. Ed., 295, 297, 27 Sup. Ct. Rep., 159; Pipe Line cases (United States v. Ohio Oil Co.), 234 U. S., 548, 560, 58 L. Ed., 1459, 1470, 34 Sup. Ct. Rep., 956. The thing which the receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own account, and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains." (Boldface ours.)

While the Landon case dealt with the subject of rate regulation, it is clear that the same reasoning applies to the right of taxation, since the right of the state in either respect is predicated upon the fact that the business is not interstate in character. That the Supreme Court is still of the opinion that the law in the Landon case is sound, is evidenced by the reference to that case in the recent case of *United Fuel Gas Co. v. Railroad Commission*, 278 U. S., p. 300. That also was a rate controversy and the public utility had attempted, in evaluating its leasehold interests, to take into consideration the price received for gas produced. In denying the effect of this assumed earning capacity, Mr. Justice Stone gives the following reason:

"It is true that a part of the appellants' business is not regulated at present, but it does not appear that the ultimate distribution of their product to consumers in other states will be immune from regulation either because of the interstate commerce clause (Pennsylvania Gas Co. v. Public Serv. Commission, 252 U. S., 23, 64 L. Ed., 434, P. U. R., 1920E, 18, 40 Sup. Ct. Rep., 279; Public Utilities Commission

> v. Landon, 249 U. S., 236, 63 L. Ed., 577, P. U. R., 1919C, 834, 39 Sup. Ct. Rep., 268), or for other reasons, and there can be no reasonable assumption that it will be."

It is apparent, therefore, that this court is firmly of the opinion that gas produced in one state may be subject to rate regulation when locally distributed in another state. It necessarily follows that such local distribution is not interstate commerce and is the subject of state taxation.

The Landon case, while the leading authority upon the point, is not the only instance in which this court has held the local distribution of gas to be not interstate commerce. In the later case of *Missouri v. Kansas Natural Gas Company*, 265 U. S., 298, this court reaffirmed and reiterated its conclusion in the Landon case. In this instance the right of the state to regulate the prices to be charged by the company transmitting the gas across the state line and selling to local distributing companies was challenged and denied. Inasmuch as this case clearly lays down the line of demarcation between what is interstate commerce and what is not, and further comments upon the case of *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S., 23, much relied upon by opposing counsel, we take the liberty of quoting from the opinion of the court, speaking through Mr. Justice Sutherland, commencing on page 308:

> "With the delivery of the gas to the distributing companies, however, the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. Public Utilities Com-

mission v. Landon, supra, p. 245. In such case the effect on interstate commerce, if there be any, is indirect and incidental. But the sale and delivery here is an inseparable part of a transaction in interstate commerce,—not local but essentially national in character,—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. It is as though the commission stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the state, and before it had become part of the general mass of property therein. See Brown v. Houston, 114 U. S., 622, 634, 29 L. Ed., 257, 261, 5 Sup. Ct. Rep., 1091. There is nothing in Pennsylvania Gas Co. v. Public Service Commission, 252 U. S., 23, 64 L. Ed., 434, P. U. R., 1920E, 18, 40 Sup. Ct. Rep., 279, inconsistent with this view. There the gas company, a Pennsylvania corporation, transmitted gas from Pennsylvania into New York, and sold it directly to the consumers. The service to the consumers which was the thing for which the regulated charge was made, was essentially local, and the decision rests upon this feature. Mr. Justice Day, in the course of the opinion, said (p. 31): 'The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the state, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to the factories and residents as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.' The commodity, after reaching the point of distribution in New York, was subdivided and sold at retail. The Landon case, so far as this phase is concerned, differs only in the fact that

the process of division and sale to consumers was carried on, not by the supply company, but by independent distributing companies.

In both cases the things done were local, and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the Landon case. **The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies."** (Boldface ours.)

The closing words of this quotation from the opinion of this court in *Missouri v. Kansas Natural Gas Co.*, we believe to be dispositive of the question at bar. East Ohio is in the "business of supplying, on demand, local consumers" (450,000); that is "local business even though the gas be brought from another state" (W. Va.) and "drawn for distribution directly from interstate mains."

It is further to be noted that *Missouri v. Kansas Natural Gas Co.* was decided after *Pennsylvania Gas Co. v. Public Service Commission* which is the authority chiefly relied upon by our opponents to support their theory that the business here involved is interstate.

Decisions of Other Courts.

Other courts than the Supreme Court have also reached a similar conclusion as to the characteristics of the business of local gas distribution.

In the case of *Galloway v. Bell*, 11 Fed. (2nd), 558,

decided in 1926 by the Court of Appeals of the District of Columbia, it is said:

> "The moment, however, that the gas is delivered to the Maryland company, the interstate movement ends. The conduct of the Maryland company in the distribution of the gas to its consumers is wholly intrastate and is subject to the control and authority of the state, acting through its public utilities commission. This is a matter, however, beyond the jurisdiction of the courts in the District of Columbia, or the district commission, to control. It is a question for the state, and not the federal authorities."

In this case this court denied a writ of certiorari, 271 U. S., 666.

Other cases holding that the local distribution of gas is not interstate commerce are:

Gas Company v. Towers (Md.), 106 Atl., 265.
Franke v. Supply Company, 70 Pa. Sup. Ct., 446.
Steel Company v. Supply Co., 70 Pa. Sup. Ct., 464.
Gas Company v. Commission, 70 Pa. Sup. Ct., 472.

Interstate Commerce Ended — "Original Package," "Processing," "Storage," "Commingling" Analogies Considered.

It is only by reason of a theoretical continuity of flow that opposing counsel in this case urge, as was also urged in each of the cases in which that theory has been denied controlling effect,—that the business of local gas distribution is interstate commerce. This theory breaks down in the light of the admitted facts in this record pertinent to the business of local gas distribution. While there exists a continuity of flow in the transmission lines, yet,

when the gas is taken through regulator stations which reduce its pressure and is then placed in thousands of mains under municipal streets to await the pleasure of the consumer, interstate commerce has ended. Four controlling factors which force this conclusion are (a) breaking of the bulk, (b) processing, (c) storage, and commingling. These will be discussed in their order.

Original Package.

(a) In certain of the cases reaching the conclusion that the business of local gas distribution is not interstate commerce, an analogy has been drawn to the "original package" theory. It has been held that metaphorically the package is broken when the gas arrives at the end of transmission lines and is there rendered fit for domestic consumption by being reduced in pressure with the resultant increase in volume, to be followed by a repetition of the process of reduction before it is sent through thousands of local mains to the service pipes of over four hundred and fifty thousand consumers, there to await the pleasure of the individual consumer.

A leading case expressing this idea is *State, ex rel. v. Flannelly*, 96 Kans., 372, and the remarks of the court in that case on pages 383 and 384 are particularly pertinent:

> "The original package rule will be of some assistance in determining whether or not the receivers' sale of gas in this state is interstate commerce. The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. Thereafter the gas ceases to be an article of interstate commerce. The gas, when sold, had become mixed with the common mass of property in this state by being so commingled with gas produced

here as to completely lose its identity. It is a matter of common knowledge that service pipes from the pipe lines of the distributing companies to private residences and other buildings belong to the owners of the property served, and installations are made at their expense. If the analogy of original packages, or importation of property in bulk applies to gas in the mains, it ceases to apply when thousands of service pipes are filled with gas to be drawn off at such times and in such quantities as the individual consumer desires. Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual purchasers at retail sale. The gas then becomes mixed with the common mass of property in the state. To exclude the power of the state from control over an article imported into it, it is necessary that the article be capable of being pointed out and identified, and the owner be able to say, 'This came from another state, and has not yet become commingled with the mass of property in this state so as to make it a part of that property.'"

The remarks of the court in this case might well be applied to the present case, since the businesses are in all respects identical.

Processing.

(b) Another indication that interstate commerce has ceased is the fact that the goods are processed, so to speak, at the point of their entrance into the various local communities in order to make them suitable for use.

The gas when it comes across the state line is carried at a pressure of from two to three hundred pounds per square inch. Such compression is accomplished on the West Virginia and Pennsylvania sides and is rendered necessary in order to effectuate proper and economical

transportation. In such form the gas is unsuitable for use by domestic consumers. (R., 31.) In order to make the gas a commodity safe for use by consumers, it must be processed by reduction of pressure until it reaches the normal pressure utilized in service pipes. This process is described in the record and consists of regulators at the city gates, which reduce the pressure so that it is maintained in the high pressure distributing lines at from thirty to fifty pounds per square inch. Similar regulators are maintained between the high pressure and the low pressure distributing lines which reduce the pressure to the number of ounces necessary to make the gas satisfactory for consumption. (R., 31.) Manifestly, the gas delivered to the burner tips of the consumer is an entirely different commodity than that transported across state lines. By the release of pressure the bulk has been magnified a hundred fold. The commodity which reaches the city gates by means of interstate transportation, from then on undergoes a proccasing which results in the furnishing to the consumer of an entirely different commodity.

Storage.

(c) Further, there exists a strong analogy between the distribution system of East Ohio and storage facilities afforded in other types of businesses, such as warehouses and storage tanks.

This court is familiar with the characteristics of an ordinary local gas distribution system, such as is involved in this case. The municipalities in question are

covered with a vast network of distribution lines which are packed, so to speak, with gas to await the pleasure of the individual consumer. As heretofore pointed out, the flow is not constant in the individual service pipes. The consumer draws gas from the facilities of the gas company in accordance with his needs. The distribution lines may, accordingly, be appropriately described as a vast reservoir upon which, according to the terms of their contracts, the consumers are authorized to draw. A commodity placed in storage to await the demands of local sales ceases to be in interstate commerce.

Atlantic Coast Railway Co. v. Standard Oil Co., 275 U. S., 257.

Any one of these indicia might well be regarded as determinative of the fact that interstate commerce had ceased. Their cumulative effect leaves no doubt that local sales of natural gas made as detailed in this record do not constitute interstate commerce.

Commingling.

There is a further fact in this case which is of significance in determining when interstate commerce ceased. By far the greater portion of the gas produced outside of Ohio was so commingled with Ohio gas before it was sold that it is accordingly impossible to determine the gross receipts from the sale of the one type as distinguished from the other. The fundamental on this point was first expressed by Chief Justice Marshall in the case of *Brown v. Maryland*, 12 Wheat, at page 441, in the following language:

> "The constitutional prohibition on the states to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving

—may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

Again on page 443 the Chief Justice states:

"This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and traveling with them as an itinerant peddler." (Boldface ours.)

Ever since this decision, commingling with the common mass of property within the state of a commodity transported in interstate commerce has always been regarded by this court as a strong indication of the fact that interstate commerce has ceased.

Moreover, *Brown v. Maryland* dealt with a property

tax, while here the question relates to an excise tax only. No attempt is made to tax the gas as such. It is merely a tax measured by gross receipts from local business, levied for the privilege of conducting such a local business.

This court might well apply to this case some of the reasoning used in the recent case of *Western Cartridge Co. v. Emmerson*, 281 U. S., 511. It was there held that no direct burden upon interstate transportation of commodities resulting from the franchise tax assessed upon the cartridge company. Mr. Justice Butler pointing out in the course of the opinion that the exaction might rise while the sales to customers outside of Illinois declined, and, conversely, might fall while such sales increased. In the present case, although interstate commerce enters into the transportation of the gas by reason of its transportation across the state line pursuant to the agreement with the West Virginia and Pennsylvania concerns, yet the local distribution, consisting of the processing of the gas to a condition suitable for use, its storage to await the needs of the consumers, its piecemeal parceling out, the making of innumerable local contracts in the various Ohio municipalities for the purchases of such gas and the furnishing of all the facilities incident to gas distribution and necessary to a fulfillment of those contracts,—is all local business carried on in Ohio, and, furthermore, these details are common to all of the "goods" which the company distributes, whether they originate in Ohio or elsewhere.

The tax in no way depends directly upon the amount

of the taxpayer's interstate purchases in the fulfillment of its local contracts, which are the basis for the determination of the tax imposed. Whatever the source of supply of gas, whether it be West Virginia or Ohio, the tax remains constant when local sales are constant. Applying the test in the Emmerson case here, the conclusion is clear that the business done is local in character and the burden of the tax is not cast directly upon that portion of the appellant's entire business which involves interstate transportation of the gas. That ceases before the Ohio activities which are the subject of the tax begin.

Similar Types of Business Not Interstate Commerce.

The treatment accorded by this court to local businesses of like character is also persuasive. In the recent case of *Atlantic Coast Railway Company v. Standard Oil Company*, 275 U. S. 257, the court had under consideration the claim of the railroad company that certain shipments made by the oil company from storage tanks located at Tampa and Jacksonville, Florida, were interstate in character, since the gasoline and oil contained therein were shipped from outside of the state and were stored by the oil company in the tanks merely for convenience and distribution. The court, however, reached the conclusion that shipments from storage tanks to points within the state of Florida were intrastate in character. In commenting upon the oil company's business, the court, speaking through Chief Justice Taft, says on page 269:

> "The important controlling fact in the present controversy, and what characterizes the nature of the

commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville, or the St. Johns river terminal. Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations, is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it. Neither the sellers who deliver the oil nor the railroad company that aids the delivery of the oil to the storage tanks and tank cars at the seaboard has anything to do with the determining what the ultimate destination of the oil is, or has any interest in it, or any duty to discharge in respect to it, except that the railroad company, after the storage in Florida has been established for the purposes of the plaintiff company, accepts the duty of transporting it in Florida to places designated by the plaintiff company.

"The compensation for the transportation of the oil through the pipe lines from the steamers to the storage tanks or to the storage tank cars, and the

transportation of those cars to the seaboard storage tanks of the plaintiff, is not here in question, and we are not asked to determine whether such delivery to the storage tanks and cars on the seaboard from the steamers are interstate or foreign commerce.

"We have no hesitation in saying that the nature of the commerce in controversy in this case was intrastate."

It is interesting to note the more detailed treatment of this case in the district court, reported as *Standard Oil Company of Kentucky v. Atlantic Coast Line*, 13 Fed. (2nd), 633. Peculiarly apt language is found in the opinion of the court on page 641 as follows:

"In determining the essential character of the movement, it is important also to remember that, notwithstanding the fact that this product is sold before it starts from Tampico, no particular part of the cargo is destined or intended for any particular purchaser, nor for delivery at any particular place beyond the ports, at any particular time, and, while it is true that all of the oil is of the same grade, yet, when the time comes to make delivery to the contract purchasers, a separation from stock is just as essential as in the case of a hardware merchant, who must select, from a stock of shovels exactly alike, the shovels he has sold to a retail merchant.

"Much is made of the alleged practically continuous flow of oil from ship to storage tanks, from storage tanks to tank cars, and thence to the bulk stations and consumers, and the movement is painted as a continuous flow of oil in interstate commerce, through the tanks, to ultimate destination. Conceding the premise, we are again reminded that continuity of movement is not the test in determining the character of the movement. On this particular contention of the defendant the case of Public Utilities of Kan-

sas v. Landon, 249 U. S., 236, 39 S. Ct., 268, 63 L. Ed., 577, is illuminating. In that case the court held that, while piping natural gas from one state to another, and there delivering it to independent local gas companies, is interstate commerce, the movement of the gas by the local companies from the point where they receive it from the pipe line company to their local consumers is intrastate commerce, and not a continuation of the interstate movement, even though the mains of the local companies are permanently connected with those of the pipe line company, and there is no interruption of the flow of the gas from the pipe lines to the mains of the local companies."

It was this reasoning which was approved and followed in the opinion of Chief Justice Taft, from which we have quoted.

A similar process of reasoning forces the same conclusion in the case at bar. The gas produced in West Virginia and Pennsylvania is not, when it crosses the state line, earmarked or ticketed for any particular consumer. It is sent in to meet the demands of East Ohio for service within the several communities in which it does its business of local gas distribution. It is entirely immaterial to the consumer from what source his gas comes. He has made no contract whereby he is to receive West Virginia or Pennsylvania, as distinguished from Ohio, gas. He has merely applied locally and has signed the usual application blank at the local office and been permitted to attach his service line to the local main. The company has no means of knowing what, if anything, the consumer will use, and it is only at the end of the usual monthly

period, when the meter on the consumer's premises is read, that the amount of gas is ascertained. Certainly the gas handled in this manner was not brought across the state line pursuant to any express contract with the individual consumer calling for such transportation. The interstate commerce ceased when the gas was delivered by the East Ohio at the city gates and its business thereafter was purely local in character. It is immaterial that the same corporation does both the transportation and the distribution. This court has so often decided that the mere intervention or non-intervention of different corporate entities in the course of a particular transaction does not change the character of the transaction that no citation of authority is deemed necessary.

In the case of *Wagner v. City of Covington*, 251 U. S., p. 95, the right of Kentucky to impose a license tax upon peddlers was involved. There the peddler was bringing soft drinks into the state and carrying his supply from one retailer's place of business to another, soliciting and negotiating sales, and it was urged that the articles were delivered in their original packages and therefore the transaction amounted to interstate commerce. Upon this point the court, speaking through Mr. Justice Pitney, says on page 103:

> "Of course the transportation of plaintiffs' goods across the state line is of itself interstate commerce; but it is not this that is taxed by the city of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the

state of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and this being so, they can claim no immunity from local regulation, whether the goods remain in original package or not."

See also *State, ex rel. v. Knight*, 192 U. S., 21.

So in this case, so far as the local sales of gas by East Ohio are concerned, the gas might just as well have been produced in Ohio as in West Virginia or Pennsylvania.

Cases in accord with the foregoing authorities are:

Myron Green Cafeteria Co. v. Kansas City, et al., 293 Mo., 519.

H. P. Hood and Sons v. Commonwealth, 235 Mass., 572.

Ward Baking Co. v. Federal Trade Commission, 264 Fed., 330.

In each of the foregoing cases interstate transportation was involved, but in each the retail sales made were held to be local and in no way in the nature of interstate commerce.

Conclusion.

No more comprehensive description of the various attributes compelling the conclusion that interstate commerce had ceased when the retail sales were made can be found than that of the statutory court in this case (R., 61) and we therefore conclude this portion of our brief by quoting the following:

"So simplified and considered, we are constrained

to the opinion that the petitioner's business, which was subjected (fol. 85) to the excise tax, was a local or intrastate business which might properly thus be taxed. Public Utilities Comm. v. Landon, 249 U. S., 236; Missouri v. Kansas Natural Gas Co., 265 U. S., 298. Not only does the language employed by the Supreme Court in these two cases aptly and comprehensively cover the present issue, but all other indicia of the true character of the business point in the same direction. Thus bulk must be considered as broken when the gas passed from the great gas transportation lines into the network of smaller distributing lines, in analogy to the original package doctrine; the interstate journey must be considered as ended when the gas is placed in proper containers, be these tanks or low pressure distribution system, for delivery to local trade, in analogy to the storage cases (Atlantic Coast Line v. Standard Oil Co., 274 U. S., 257, 269); the gas must be considered processed and modified in an essential characteristic when its pressure is so reduced as to make it available for consumers' use, if analogy to the processing of goods, as breaking the interstate journey, be drawn; and, so far as the relationship between the company and consumer is concerned, it makes no difference whatever to the latter whence comes the gas. The trade was essentially local. The transportation of the gas from West Virginia was but a preparation for it. Wagner v. City of Covington, 251 U. S., 95, 103."

POINT B.

Sales of Natural Gas From a Citizen of One State to a Citizen of the Same State, Under a Contract Which Neither Expressly Nor Impliedly Provides that the Commodity So Sold Is to Be Transported Across State Lines, Do Not Constitute Interstate Commerce, Even Though a Part of the Gas Furnished in Performing the Contract Has Its Origin Outside of the State.

It is essential to a full understanding of the case that the contracts under which sales were made should be constantly borne in mind.

The contract in each instance is in form substantially as set forth on page 32 of the record. There is here no commitment on the part of the company to furnish gas from outside of the state of Ohio. The consumer is not interested in the source of the gas, and his necessities may be supplied by natural gas from any source. The company could at any time abandon its foreign source of supply and furnish gas produced within Ohio without violating any term of the contract. The means whereby the company fulfilled the obligations of its contract to furnish gas were entirely within the discretion of the company, and the consumer had no interest therein.

Moreover, the commodity purchased was not of such a character that it could be produced only beyond the

borders of the state of Ohio, in which event there might possibly be implied the obligation to transport in interstate commerce. East Ohio itself is a large producer of gas in the state of Ohio and there is no showing in the record of the impossibility of producing or purchasing within the state gas sufficient to serve all of the needs of the consumers of the company. Quite obviously there is nothing either in the contract itself or in the nature of the commodity purchased which requires transportation of gas in interstate commerce. Under such circumstances, the act of the company in choosing to perform its contract by the use of gas produced outside of the state of Ohio cannot convert a purely local transaction into interstate commerce.

It must be borne in mind that Ohio is not here seeking to impose a tax upon the sale from the Hope Natural Gas Company to East Ohio. That question is not involved. The existence of the contract between the producing company and East Ohio is of no materiality in determining the status of the contract between East Ohio and its consumers, at least in the absence of specific recognition of the existence of that contract in the agreements with the consumers.

A long line of decisions of this court substantiate the position hereinabove stated. Utilizing as his authority many of the cases hereinafter referred to, Cooley, in his work on taxation, 4th Edition, at pp. 802-803, states:

> "There can be no interstate commerce unless as a part of the transaction there is in contemplation some act of transportation between two or more

states. In determining whether a commercial or trading business is interstate, the place where the contracts are made or where the title passes are not decisive. A state stamp tax law, such as a tax upon transfers of stock, does not violate the commerce clause, so far as the tax is imposed on transactions wholly within the state, because they affect property outside the state or because one or both of the parties previously came from other states. A state tax on persons engaged in buying and selling cotton for future delivery, where interstate shipments are not required, is valid, since such contracts are not subjects of interstate commerce. Parties cannot by a non-essential contract, convert an exclusively local business subject to state control into an interstate commerce business protected by the commerce clause so as to remove it from the taxing power of the state. Where the sale of an article manufactured in another state is wholly intrastate, as between vendor and vendee, it does not become interstate and immune from state taxation because the purchaser pays freight from the place of manufacture nor because the purchaser obtains a warranty direct from the manufacturer."

One of the leading cases decided by this court on this point is that of *Ware & Leland v. Mobile County*, 209 U. S., p. 405, which involved a state tax upon the business of taking orders on commission for the purchase and sale of grain and cotton for future delivery. The law was attacked upon the ground that deliveries might be involved which would comprehend transportation in interstate commerce. With respect to this contention, Mr. Justice Day states on page 413 as follows:

"When the delivery was upon a contract of sale made by the broker, the seller was at liberty to ac-

quire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation to do so. In neither class of contracts for sale or purchase, was there necessarily any movement of commodities in interstate traffic because of the contracts made by the brokers.

These contracts are not, therefore, the subjects of interstate commerce any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company. The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

This reasoning is equally applicable in the instant case where the contract between the East Ohio and the consumer might or might not be carried out by the interstate transportation of gas.

An even stronger case is that of *Banker Bros. Co. v Pennsylvania*, 222 U. S., 210, in which a tax of the state of Pennsylvania, upon sales of retail vendors of automobiles, was attacked upon the ground that the sales were made in interstate commerce. The dealer in question had the sales agency of the manufacturer of Pierce-Arrow cars, which was a New York concern, its only manufacturing plant being located in Buffalo. Only demonstrating cars were kept in stock and the order blanks con-

tained an agreement to pay the list price "f. o. b. factory." It was urged that the sale was an interstate transaction between the manufacturer and the purchaser and that the dealer acted merely as agent for the delivery and collection of the purchase price. Mr. Justice Lamar, in delivering the opinion of the court, makes short shrift of this contention, his conclusions being expressed in the following language found on pp. 213, 214, of the opinion:

> "This is one of the common cases in which parties find it to their interest to occupy the position of vendor and vendee for some purposes under a contract containing terms which, for the purpose of restricting sales and securing payment, come near to creating the relation of principal and agent. But, as between Banker Brothers Company and the Pittsburgh purchaser, there can be no doubt that it occupied the position of vendor. As such it was bound by its contract to him, and under the duty of paying to the state a tax on the sale.
>
> The name of the Pierce company was not mentioned in the order signed by the purchaser. Had there been a breach of its terms he would have had a cause of action against the Banker Brothers Company, with whom alone he dealt. If he had failed to complete the purchase, the Pierce company would have no right to sue him on the contract. The fact that he was liable for the freight by virtue of the agreement to 'pay the list price f. o. b. factory' did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because, with the machine, Banker Brothers Company also delivered to the buyer in Pittsburgh a warranty from the manufacturer direct.
>
> These were mere incidents of the intrastate contract of sale between Banker Brothers Company and the purchaser in Pittsburgh, who was not concerned

with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city, or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. See American Steel and Wire Co. v. Speed, 192 U. S., 500, 48 L. Ed., 538, 24 Sup. Ct. Rep., 365; American Exp. Co. v. Iowa, 196 U. S., 147, 49 L. Ed., 423, 25 Sup. Ct. Rep., 182. The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania."

Again, in the case of *United States Fidelity and Guaranty Company v. Kentucky*, 231 U. S., p. 394, a license tax upon persons engaged in the business of inquiring into and reporting on the credit and standing of persons engaged in business in Kentucky was involved. Here also appeared the contention that there was an interference with interstate commerce and that interstate commerce was being attacked. In respect thereto, Mr. Justice Pitney states on page 399 as follows:

"The present case has no close parallel in former decisions, but in some of its aspects it bears a resemblance to the case of a tax imposed upon a resident citizen engaged in a general business that happens to include a considerable share of interstate business. Ficklen v. Taxing Dist., 145 U. S., 1, 36 L. Ed., 601, 4 Inters. Com. Rep., 12 Sup. Ct. Rep., 810. Or the business of the live stock exchange that was under consideration in Hopkins v. United States, 171 U. S., 578, 592, 43 L. Ed., 290, 296, 19 Sup Ct. Rep., 40. Or the business of a cotton broker dealing in futures or options. Ware v. Mobile County,

209 U. S., 405, 52 L. Ed., 855, 28 Sup. Ct. Rep., 526, 14 Ann. Cas., 1031.

To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. We do not think the present is such a case."

We also refer the court to the case of *Blumenstock Bros. Advertising Company v. Curtis Publishing Company*, 252 U. S., 436, where the authorities are fully reviewed and approval of the rule stated in the foregoing cases given.

Lastly, we call to the attention of the court the case of *Moore v. United States Cotton Exchange, et al.*, 270 U. S., 593, which was a bill brought to compel the furnishing to the complainant of trade quotations, federal jurisdiction being invoked on the ground that there was a violation of the anti-trust laws of the United States. As this point required a determination of the character of the business of the New York Cotton Exchange, the court, speaking through Mr. Justice Sutherland, made the following comments:

"The New York Exchange is engaged in a local business. Transactions between its members are purely local in their inception and in their execution. They consist of agreements made on the spot for the purchase and sale of cotton for future delivery, with a provision that such cotton must be represented by a warehouse receipt issued by a licensed warehouse in the port of New York and be deliverable from such warehouse. Such agreements do not provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another.

If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce. Ware & Leland v. Mobile County, 209 U. S., 405, 412, 413, 52 L. Ed., 855, 859, 28 Sup. Ct. Rep., 526, 14 Ann. Cas., 1031. The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough. Engel v. O'Malley, 219 U. S., 128, 139, 55 L. Ed., 128, 137, 31 Sup. Ct. Rep., 190. See also Hopkins v. United States, 171 U. S., 578, 588, 590, 43 L. Ed., 290, 294, 295, 19 Sup. Ct. Rep., 40; Anderson v. United States, 171 U. S., 604, 615, 616, 43 L. Ed., 300, 305, 306, 19 Sup. Ct. Rep., 50."

Conclusion.

These authorities lead inevitably to the conclusion that the sale of natural gas by East Ohio to its hundreds of thousands of consumers in Ohio, which sales are pursuant to contract made in Ohio—to be performed in Ohio—and without any specification that the gas is to come from any particular source—constitutes local business, on the privilege of doing which Ohio may levy an excise tax without violating the interstate commerce clause of the Constitution.

AUTHORITIES RELIED UPON BY OPPOSING COUNSEL.

The appellant grounds its contention primarily upon expressions of this court found in *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S., 23, and *Peoples Gas Company v. Public Service Commission*, 270 U. S., 550.

In the consideration of the former case it is important to bear in mind just what was involved and what the real conclusion of the court was. The Pennsylvania Gas Company was a corporation organized under the laws of the state of Pennsylvania and transported gas from its source of supply in the state of Pennsylvania into the state of New York and there delivered it to consumers in the city of Jamestown, as well as other points. The specific question involved was whether the Public Service Commission of New York had the power to regulate rates for gas sold to consumers in Jamestown. The opinion by Mr. Justice Day is susceptible of the interpretation that the whole transmission was one in interstate commerce, but the conclusion is reached that, since Congress had not acted, the matter of local rate regulation could be undertaken by local authorities without directly burdening interstate commerce. One essential distinction between that case and the one here for consideration is that the Pennsylvania Gas Company was a foreign corporation producing in Pennsylvania, transporting to New York and there distributing, gas. Here East Ohio may be aptly described

as a large type of local distributing company. Instead of receiving the gas at the city gates, it extends its lines and receives certain of its gas at the state line. Whether its connection with the pipe line of The Hope Natural Gas Company existed at the city gate or at the state line is, we respectfully submit, of neither practical nor legal significance. Thus considered, the present case comes precisely within the language of Mr. Justice McReynolds heretofore quoted from the case of Public Utilities Commission v. Landon, supra. It is also clearly within the language of Mr. Justice Sutherland in the case of *Missouri v. Kansas Natural Gas Company*, supra.

Two essential distinctions exist, therefore, in that East Ohio is an Ohio corppration and does not produce gas outside of the state, whereas the Pennsylvania Gas Company was a foreign corporation producing gas outside of the state of New York.

Aside from these controlling distinctions, we invite the attention of the court to the fact that the ultimate conclusion of the case was that the state might lawfully regulate local rates. This in no way militates against our contention here that the state of Ohio may likewise assess upon this company for local business a reasonable excise tax no different in amount than that which it assesses against all corporations of similar character.

The other case most relied upon by opposing counsel is that of *Peoples Gas Company v. Public Service Commission*, 270 U. S., 550. In this case it is also important to bear in mind just what the facts were. The Peoples Na-

tural Gas Company brought the action to contest the validity of an order of the Public Service Commission of Pennsylvania, requiring it to continue to supply gas to a local distributing company at Johnstown, Pa. A large portion of the gas which it furnished to the local company was transported by it from the state line, where it was received from the line of a producing company in West Virginia. The real question before the court was whether the company was engaged in interstate commerce, in view of the fact that it itself did not actually bring the gas into the state but purchased it at the state line. It was conceded, of course, that, aside from this additional factor, the business must be regarded as interstate under many earlier decisions of this court, notably the Landon case, heretofore discussed. The court concluded that the transmission of the gas to the distributing company at Johnstown was interstate commerce, irrespective of the fact that the gas was purchased at the state line. It did not, however, hold, nor was the question before it, that the local distributing company in Johnstown was engaged in interstate commerce.

The principles of that case applied to the case at bar would only extend to holding interstate that portion of the business of East Ohio which comprehends the transportation of the gas from the state line to the gates of the various municipalities which it serves. With this conclusion we have no present quarrel. So, when Mr. Justice Van Devanter speaks on page 554 of the transportation of the gas to the place "of consumption in the

other" state, he was speaking of the point of delivery to the Johnstown company and not to the ultimate consumers of the gas.

Of like effect is another case relied upon by opposing counsel, viz., *Public Utilities Commission v. Attleboro Steam and Electric Company*, 273 U. S., 83. This likewise was a question involving purchase at the state line and delivery to a local distributing company for ultimate distribution, the only distinction being that the commodity here involved was electric energy. We have no quarrel with the conclusion of the court in the Attleboro case, since it deals solely with the character of the business of a company selling wholesale to distributing companies which do a local business. In fact, we are in accord with the principles therein announced that the corporate entities involved in a particular transaction do not constitute a legitimate ground of differentiation of that which is interstate and that which is intrastate in character. Applying this principle, it necessarily follows that a company engaged both in the transportation of gas and the distribution thereof locally to consumers is engaged in two types of business, which are distinct and must, under the interstate commerce clause, be separately treated. As is stated in the Attleboro case, on page 90:

> "The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business, it is none the less beyond the

power of the state because this may be the smaller part of its general business."

By like process of reasoning, the state may legitimately tax the intrastate distribution business of East Ohio, although that company is also engaged in the business of transporting gas.

We have no quarrel with the cases of *New Jersey Bell Telephone Company v. State Board of Taxes and Assessments*, 280 U. S., 338; *Port Richmond Ferry v. Hudson County*, 234 U. S., 317, or *City of Sault Ste. Marie v. International Transit Co.*, 234 U. S., 333, which are cited by opposing counsel. Each of these cases involved transactions clearly interstate in character. When a telephone subscriber calls a point outside of the state, clearly it is within the contemplation of both the subscriber and the company that interstate business is being transacted.

Likewise, in the case of ferrying across a river from one state to another, there can be no question of the intent of the parties concerned to contract with respect to transportation of persons and property across state boundaries. This distinction renders unnecessary further comment upon these cases.

Much stress is placed upon the decision reached by Judge Cardozo in the case of *People, ex rel., Pennsylvania Gas Company v. Saxe*, 229 N. Y., 446. The same point of distinction exists here as was indicated with respect to the case of Pennsylvania Gas Company v. Public Service Commission, supra. The tax was imposed upon a foreign corporation bringing its own gas, produced outside of New

York, into that state and distributing it locally. The analysis which the learned judge makes of the business of local gas distribution is, however, we respectfully submit, erroneous. Moreover, the all-important factor of the precise contractual relationship involved is absent from that case.

East Ohio's four hundred and fifty thousand consumers make contracts locally with an Ohio corporation, at local offices maintained in the several Ohio communities in which it supplies its gas. All the attributes of the business, which the court will bear in mind are vastly more than the mere transmission of gas, and include the exercise of local franchises, the maintenance of local offices, the adjustment of facilities, the exaction of service or minimum charges, etc., are purely local in character, hence this case stands upon an entirely different basis than that before the New York court.

The interstate transportation in the case here is purely incidental and antecedent to the fulfilment of the local contract with the consumer and in nowise characterizes those contracts as interstate commerce so as to preclude the imposition of the tax here in question. *Wagner v. City of Covington*, supra.

THE TAXING STATUTE HERE INVOLVED IS BROAD ENOUGH TO COVER THE BUSINESS OF APPELLANT.

Some suggestion is made by opposing counsel that, conceding the business of appellant to be so localized as to subject it to both taxation and regulation, nevertheless the pertinent sections of the Ohio Code specifically exclude such business from the burdens of the tax.

It is submitted that an examination of the language and history of the pertinent sections of law effectively disposes of any such contention.

Originally, the excise tax here under consideration was assessed upon "the gross receipts" of the various utilities "for business done within the state of Ohio." Following the decision of this court in the case of *Galveston Railway Co. v. Texas*, 210 U. S., 217, which was rendered in 1908, the legislature amended these laws so as to exclude the type of business from its provisions which this court said the state was powerless to tax. This amendatory provision was enacted in 1910 and imposed a tax upon the privilege of doing "intrastate business," and specifically excluded receipts from "interstate business." The action here is to protect the company from an alleged violation of federal constitutional rights. While this court can, and will doubtless, take complete jurisdiction of a case and interpret a state statute, once its jurisdiction is properly invoked, yet it is respectfully urged that a reason-

able and proper interpretation of the pertinent sections of the Ohio law is that a tax is levied upon all business of supplying natural gas to consumers within Ohio over which that sovereignty has jurisdiction. The manifest intention was to exclude only that which must of necessity be excluded, for otherwise there would arise a discrimination against domestic commodities—a result which certainly cannot be fairly imputed to the Ohio legislature.

Accordingly, if this court should perchance be of the opinion that the business here in question, while localized in character, has certain attributes of interstate commerce, which we most earnestly deny, and should at the same time be of the opinion that a fair and non-discriminatory tax upon this type of business is sustainable, there can be no question but that the tax is assessed by the pertinent Ohio laws.

CONCLUSION.

Our opponents here seek to have this court extend the implied inhibition of the interstate commerce clause of the Constitution far beyond its boundaries as set by decisions of this court. It is not amiss, therefore, to advert to the fundamentals upon which this provision of the Constitution is based and to point out the logical consequences to the states, both economically and governmentally, which would result from accepting opponent's position.

By the adoption of the federal Constitution the states

surrendered to the Federal Government certain powers of sovereignty, so far as that surrender was deemed essential for the general welfare. The grant to Congress of the power to regulate commerce among the states has been held to negative the right of the states to place such a burden upon that commerce as would tend to restrict free intercourse. The broad purpose was that a state should not stand at its boundary line, so to speak, and collect toll for the privilege of bringing commodities from other states within its boundaries. Thus in the instant case Ohio could not lawfully impose a tax upon the Hope Natural Gas Company for the privilege of selling its gas to East Ohio Gas Company; nor could Ohio lawfully impose a tax upon East Ohio for the right to bring in gas from other states. No such effort is here made. The transactions of East Ohio in purchasing from the Hope Natural Gas Company and of transporting gas from West Virginia are not the objects of Ohio's taxation.

On the other hand, a property tax may be properly assessed upon commodities which have been transported in interstate commerce once they attain a taxable situs within the state. Similarly, an excise tax upon transactions between citizens of the same state is legitimate, although the commodities involved originate beyond the state boundary, for business may be localized as well as the property itself.

Opponent's position has the effect not only of extending the interstate commerce clause beyond its governmental purposes but also of using it as an instrument causing

economic loss to the individual states. If the local business of East Ohio done with gas it brings from West Virginia be not subject to the excise tax, while at the same time the local business of Ohio producers of natural gas, and indeed the local business of East Ohio itself done with Ohio gas, be subject to the tax,—then the economic result to Ohio is that domestic production of natural gas would be discriminated against. The only alternative would be to permit all business of local gas distribution to escape the burden of taxation, thus freeing a vast and profitable enterprise whose properties and activities are protected locally and whose earning power is substantially guaranteed by state regulation, from bearing its legitimate part of governmental expense. Companies, such as East Ohio, doing a local gas distribution business in fifty municipalities and with over four hundred and fifty thousand customers—obtain their right to do business through local franchises—they occupy the streets owned by the public—they are assured a fair return upon the value of their property under local laws, and their property is safeguarded by local authorities. All this is at local expense. Is it possible that the sovereign from which they derive the necessary power to carry on the business of local gas distribution has not the correlative power to impose a tax, fair in amount and non-discriminatory, through which these companies may be compelled to contribute their fair share of the cost of that local government? To ask the question is to answer it. Nor can the answer be that the sovereign state must

either lose the tax or discriminate against its home pr
duced commodities!

There is another aspect of opponent's thesis of eve
deeper governmental significance. Modern engineerin
developments now make possible the long distance tran
portation of electrical energy in high voltage transmi
sion wires; of oils in pipe lines; of gas in transmissio
mains. Science has hurdled state lines. Further, moder
financial methods make possible the concentration of va
financial resources which permit billion dollar corpora
tions to do a country-wide business. If this court shoul
adopt opponent's position and should tie together th
engineering and the financial developments of moder
America so that business in these great underlying com
modities of power, oil and gas remained interstate com
merce from point of origin to point of final consumptio
then the original gift, so grudgingly bestowed by th
states on the national government, of the power t
regulate interstate commerce would indeed become
quit-claim deed to half the sovereignty of the individua
states! The true answer has, we contend, already bee
given by this court in the Landon and the Missouri case
that answer is found in the language of the court, speak
ing through Mr. Justice McReynolds and Mr. Justic
Sutherland, respectively: "Interstate commerce is
practical conception and what falls within it must be de
termined upon consideration of established facts an
known commercial methods." "The business of sup
plying, on demand, local consumers, is a local busines
even though the gas be brought from another state an

drawn for distribution directly from interstate mains. * * *"

The taxes levied in the case at bar are excise taxes upon the privilege of doing business in Ohio. East Ohio, in supplying its four hundred and fifty thousand consumers, does it pursuant to local franchises through distribution mains in local streets, and contracts for the commodity are made locally between East Ohio and its Ohio customers. The subject matter of the contract is gas, with no mention of its source, which can and is being supplied by East Ohio from either Ohio or West Virginia. Such business is local business. The claimed physical continuity of flow upon which opponents hinge their case does not in fact exist. The gas, after being brought through the high pressure transmission mains, lies in the distribution system and in the service lines of the consumers awaiting the pleasure of the individual consumers. But even that claimed continuity of flow has been held by this court to be not decisive. It gives to the transaction merely an aspect of interstate commerce which is antecedent to and incidental to the local business which is really the subject of the excise tax. This local distribution business is done after the commerce "in its essentially national aspect has come to an end."

The decision of the court below should be affirmed.

Respectfully submitted,

GILBERT BETTMAN,
Attorney General of Ohio,
Solicitor for Appellees.

L. F. LAYLIN,
WILLIAM J. FORD,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 453.—October Term, 1930.

The East Ohio Gas Company, Appellant, *vs.* The Tax Commission of Ohio et al.	Appeal from the District Court of the United States for the Southern District of Ohio.

[May 18, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

Appellees, acting under the tax laws of Ohio, assessed against appellant additional excise taxes for 1927, 1928 and 1929. The latter brought this suit to restrain collection on the ground that, when construed to cover the amounts demanded, the state legislation is repugnant to the commerce clause of the Federal Constitution. Plaintiff applied to the court consisting of three judges for a temporary injunction; and, pursuant to stipulation made at the hearing, the case was submitted for final determination upon an agreed statement of facts. The court announced an opinion (42 F. (2d) 170) sustaining the state enactments and entered its decree dismissing the complaint.

Under the Ohio Code every corporation engaged in the business of supplying to consumers within the State natural gas for light, heat or power is a natural gas company, § 5416, and is required to report to the tax commission, § 5470. The latter is directed annually to determine the entire gross receipts of such company, for the year ending on the then next preceding first day of May, excluding therefrom all receipts "derived wholly from interstate business", §5475, and to certify the amount so determined to the auditor of state, §5481. He is directed to charge each such company "a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intra-state business . . . by taking one and thirty-five one-hundredths per cent. of all such gross receipts . . . ". § 5483.

Appellant, an Ohio corporation, is engaged as a public utility in the business of furnishing natural gas to consumers in more than 50 municipalities in that State. During the years in question it obtained approximately 25 per cent. of its supply from its own Ohio wells, 72 per cent. from the Hope Natural Gas Company of West Virginia and 3 per cent. from the Peoples Natural Gas Company of Pennsylvania. The West Virginia gas is gathered to a station in that State, there freed from gasoline vapors and pumped at a pressure of from 200 to 300 pounds per square inch into transmission lines which connect, at the boundary between the States, with appellant's high pressure transmission lines. By means of these the gas is transmitted to a station in Stark county whence it is taken by other lines to pressure reducing stations. The lines there connect with distribution lines in which is maintained pressure of from 30 to 50 pounds per square inch and which are a part of the distribution system in each municipality served. From the latter the gas enters the local supply mains wherein pressure is reduced to that necessary—a few ounces per square inch—to carry the gas through the service pipes extending to the premises of consumers and suitably to supply their burners. The consumers control the flow of gas on their premises. The Pennsylvania gas is collected, treated, compressed for transmission, delivered to appellant at the state line and by it transported, relieved of pressure and conducted through such mains and service pipes to consumers' appliances precisely as is West Virginia gas. The Ohio gas is gathered and conducted from the fields in that State to the high pressure distribution lines and thereafter treated and brought to consumers as is the gas brought from the other States. Appellant's contracts with consumers do not specify any source from which it is to obtain gas. To an extent not disclosed by the record, appellant collects minimum charges for service and charges for readiness to serve without regard to the quantity of gas consumed. It furnishes to some communities exclusively gas from outside the State, to some only that from Ohio and to others a mixture of that from West Virginia and Ohio.

In accordance with the statute, as then construed by the attorney general, appellant in its reports to the tax commission for the years in question returned as receipts from interstate business all sums collected from customers receiving only gas from wells out-

side Ohio, treated as intrastate earnings the receipts from those using only Ohio gas and apportioned between intrastate and interstate business, on the relation of the quantity of each to the total, receipts from those served by a mixture of Ohio and other gas. The commission accepted that classification, and the taxes were computed and paid on that basis. In 1930 appellees, construing the laws to require the inclusion of all receipts, without regard to the source of the gas furnished, applied the prescribed rate to the amounts theretofore treated as receipts from interstate business, and demanded from appellant payment of the sums so arrived at together with penalties prescribed for failure to pay excise taxes when due.

The question is whether the state statute, construed to include the amounts reported as receipts from interstate business, operates directly to regulate or burden interstate commerce.

Admittedly the exaction is not a tax on property nor in lieu of a property tax. The statute calls it, and in fact it is, a tax for the privilege of carrying on intrastate business. Receipts from interstate business are expressly excluded from the calculation. It is elementary that a State can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. *Pullman Co.* v. *Richardson*, 261 U. S. 330, 338. *New Jersey Tel. Co.* v. *Tax Board*, 280 U. S. 338, 346. And, while a State may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business. *Sprout* v. *South Bend*, 277 U. S. 163, 170-171, and cases cited.

The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local systems is essentially national—not local—in character and is interstate commerce within as well as without that State. The mere fact that the title or the custody of the gas passes while it is en route from State to State is not determinative of the

question where interstate commerce ends. *Public Utilities Comm.* v. *Landon*, 249 U. S. 239, 245. *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 307-309. *Peoples Gas Co.* v. *Pub. Ser. Comm.*, 270 U. S. 550, 554. *Pub. Util. Comm.* v. *Attleboro Co.*, 273 U. S. 83, 89. But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail. *State* v. *Flannelly*, 96 Kan. 372, 383-384. *W. Va. & Md. Gas Co.* v. *Public S. Com.*, 134 Md. 137, 143-145. Cf. *Atlantic Coast Line* v. *Standard Oil Co.*, 275 U. S. 257, 269. *Brown* v. *Maryland*, 12 Wheat. 419. *Leisy* v. *Hardin*, 135 U. S. 100. It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the State.

Appellant relies on *Pennsylvania Gas Co.* v. *Public Service Comm.*, 252 U. S. 23. There the question was whether the New York commission had jurisdiction to prescribe the rates to be charged local consumers of gas transported to that State from Pennsylvania. This court, following the findings of the highest court of New York (225 N. Y. 397, 403-404), held that the entire movement of the gas was interstate commerce and that, in the absence of contrary regulation by the Congress, the state commission had jurisdiction to prescribe such rates. The theory on which that conclusion was reached is not wholly consistent with the views expressed in *Public Utilities Comm.* v. *Landon, supra*, and in *Missouri* v. *Kansas Gas Co., supra*. In the former the court said (p. 245): "Interstate movement [of natural gas being transported from State to State] ended when the gas passed into local mains". In the

latter, it was said (p. 308): "With the delivery of the gas [transported from one State to another] to the distributing companies . . . the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. . . . In such case the effect on interstate commerce, if there be any, is indirect and incidental. . . . [p 309] The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance." It does not appear that there were presented, in *Pennsylvania Gas Co.* v. *Public Service Comm.* to the state court or here the considerations on which it is held that interstate commerce ends and intrastate business begins when gas flowing through pipe lines from outside the State passes into local distribution systems for delivery to consumers in the municipalities served. But, however that may be, the opinion in that case must be disapproved to the extent that it is in conflict with our decision here.

The Ohio statute does not purport to affect interstate commerce. The specified excise taxes are laid for the privilege of carrying on intrastate business. The amounts were calculated on gross receipts derived wholly from appellant's intrastate business notwithstanding the gas used had moved in interstate commerce.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.